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No. 92-1472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO TRANSIT AUTHORITY,

Petitioner,

v.

JAE BOON LEE, Administratrix of the Estate of Sang Yeul Lee, Deceased,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Illinois Supreme Court violate the Fourteenth Amendment procedural due process right of the Chicago Transit Authority (CTA) to a fair trial by relying on the jury's general verdict to reinstate the judgment against the CTA based on the court's determination that

(1) the CTA breached the court's newly-created duty of ordinary care to warn an undiscovered adult trespasser by providing inadequate warnings and

(2) those inadequate warnings were—despite the respondent's husband's blood alcohol level of 0.341 and his inability to read English—both the cause-in-fact and proximate cause of his death?

Did the Illinois Supreme Court deny the CTA's substantive due process rights under the Fourteenth Amendment by

(1) imposing a duty directly rejected by the Illinois Supreme Court in another case as denying substantive due process and

(2) denying the CTA the right to a jury trial as guaranteed by the 1970 Illinois Constitution?

LIST OF PARTIES

Jae Boon Lee, Administratrix of the Estate of San Yeul Lee, Deceased

(Plaintiff in the Circuit Court of Cook County Illinois; Appellee in the Appellate Court of Illinois, First Judicial District, Fifth Division; Appellant in the Supreme Court of Illinois)

Chicago Transit Authority, an Illinois Municipal Corporation

(Defendant in the Circuit Court of Illinois; Appellant in the Appellate Court of Illinois, First District, Fifth Division; Appellee in Supreme Court of Illinois)

RULE 29.1 LIST

Respondent, Jae Boon Lee, Administratrix of the Estate of San Yeul Lee, Deceased, is an individual to whom Rule 29.1 does not apply.

Petitioner Chicago Transit Authority is a municipal corporation created under the authority of the Metropolitan Transit Authority Act, Ill. Rev. Stat. ch. 111⅔, ¶¶ 301-359 (1992) (recodified as 70 ILCS §§ 3605/1-48 (1993)), and has no parent or subsidiary corporation within the meaning of Rule 29.1.

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Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

Petitioner, Chicago Transit Authority (CTA), seeks issuance of a Writ of Certiorari to the Supreme Court of Illinois.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported as *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 605 N.E.2d 493 (1992), and is reprinted in the Appendix at A1-41. The Illinois Supreme Court's order denying the CTA's Petition for Rehearing is reproduced in the Appendix at A42.

The opinion of the Appellate Court of Illinois is reported as *Lee v. Chicago Transit Authority*, 205 Ill. App. 3d 163, 562 N.E.2d 556 (1st Dist. 1990). It is reprinted in the Appendix at A43-57. The order of the Appellate Court of Illinois denying Respondent's Petition for Rehearing is reproduced in the Appendix at A58.

JURISDICTION

On October 22, 1992, the Illinois Supreme Court filed a decision in this case in which it reinstated a jury verdict against the CTA by creating, and then imposing on the CTA, a new common law duty on which the jury had not been instructed. The CTA filed a petition for rehearing, asserting, *inter alia*, that the Illinois Supreme Court's decision violated the CTA's due process rights. The CTA's Petition for Rehearing is reprinted in the Appendix at A59-89. The Illinois Supreme Court denied the CTA's Petition for Rehearing on December 7, 1992. A42. The CTA invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves Section One of the Fourteenth Amendment to the United States Constitution. Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

This petition also involves Section Thirteen of Article I of the 1970 Illinois Constitution. Section Thirteen provides: "The right of trial by jury shall remain inviolate." 1970 Ill. Const. art. I, § 13.

STATEMENT OF THE CASE

The CTA operates a rapid transit elevated railroad (the "L") in the Chicago metropolitan area. The "L" runs on electric power which it receives through an electrified third rail running parallel to the "L" tracks. R. 591, 1163. Not entirely elevated, the "L" crosses intersections on street or "at grade" level in twenty-five places. R. 341-42. One such crossing is the intersection of the Ravenswood "L" and Kedzie Avenue. In 1977, the CTA's "L" carried 85 million passengers. R. 1161.

Respondent, Jae Boon Lee, is the administratrix of the estate of her husband, Sang Yeul Lee (Lee). Lee, a Korean immigrant, was unable to read or write English. R. 520, 813-14. On his way home from a party for a fellow Korean worker, Lee entered the CTA's Kedzie right-of-way to urinate. At 3:00 a.m. on October 22, 1977, he was found lying

perpendicular to the tracks, dead from electrocution which occurred when he relieved himself on the electrified third rail. R. 797-98, 801, 802, 808.

At the time of his death, Lee's blood-alcohol level was 0.341. R. 1277-78; *see also* R. 113, 240. He was neither permitted nor invited to be on the Kedzie Avenue CTA tracks. R. 339, 1158, 1164-65. He was a trespasser.

Respondent brought a wrongful death action in the Circuit Court of Cook County against the CTA to recover damages for Lee's death. Proceeding under her Third Amended Complaint, Respondent alleged that several negligent acts or omission of the CTA caused Lee's death, including the CTA's failure (a) to post adequate warnings, barricades or signs to alert pedestrians to the presence of a third rail; (b) to safely design, construct, operate, and maintain the "L"; (c) to guard the third rail; (d) to provide an alternative means of supplying electric energy to operate its rapid transit trains at or near grade level crossings; (e) to warn that the third rail carried 600 volts of electricity; (f) to warn that the third rail carried enough electricity to kill or injure persons who would come in contact with it. R. C349, C353. Respondent also contended that the CTA was guilty of willful and wanton conduct. R. C352.

The Trial

At trial, the CTA introduced evidence that, to prevent pedestrians from entering the right-of-way at grade and contacting the third rail, the CTA had developed a "pedestrian access barrier system" which consisted of (1) warning signs, R. 1160, 1208; (2) access barriers and chain link fences, R. 1206-07; (3) trespass barriers or "jaws," R. 1168; and (4) right-of-way fencing, R. 1160. All of these barriers were in place at the time of Lee's death.

In order to reach the third rail, Lee had to walk off the sidewalk past five rectangular warning signs placed on a utility shed or on "chest high" wooden access barriers on the east side of the Kedzie crossing. R. 1206, Pl. Ex. 2A, 6A, 11, 12, 13, 40A; R. 1160, Ex. 6A. Each of the signs warned "**DANGER**," "**KEEP OUT**," and "**ELECTRIC CURRENT**." R. 609, 610, 632, 704; Pl. Ex. 40A, Pl. Ex. 6A. The wooden access barriers are located between the two sets of tracks and between the edge of the right-of-way and the tracks, R. 1206. The four wooden barriers on the inside of the tracks are further augmented by two chain link fences at each grade crossing that run parallel to the street between the tracks. R. 1207-08; *see* Pl. Ex. 12. The CTA also has fencing which runs parallel to the CTA's right-of-way.

In addition to circumventing the barriers, Lee had to walk over approximately 6½ feet of sharp, uneven-edged boards sticking up in the air, about six inches apart. R. 1258; *see* Pl. Ex. 10. The boards, or "jaws," are diagonally cut timbers, "6 inches by 8 inches," Def. Ex. 2A, triangular in shape, R. 606, and intentionally designed to provide an uneven and difficult walking surface, R. 611, 624, 654, 1258. The "jaws" at Kedzie extend from the sidewalk beyond the edge of the third rail, R. 656, and are also placed on either side of the third rail and between the tracks, R. 1170; Def. Ex. 2A. The jaws connect with both the wooden access barriers, Def. Ex. 2A, and the chain link fences, R. 1207-08.

The purpose of the CTA's signs is to warn pedestrians of the danger of the third rail and to stay out of the right-of-way. R. 610, 634, 638, 706, 1160, 1208. The purpose of the CTA's barriers is to warn and deter pedestrians from entering the track area from the street. R. 1206-07; 608, *see also* R. 613, 703, 706, 707, 716, 720, 725, 1160.

Refusing a pretrial stipulation to notice of prior grade level accidents offered by the CTA, R. 40, 174, 188, 190, and over the CTA's repeated objection, *see* R. 284-85, 307, 682, 685-86, 688, 689, 729, Respondent introduced evidence of ten prior accidents which occurred between 1948 and 1975 on the 3.2-mile segment of track where the CTA's third rail runs at grade level. This evidence was admitted even though none of the ten accidents involved facts similar to Lee's accident, only one of the accidents occurred even near (but not at) the Kedzie crossing, and there were no accidents at any of the grade level crossings between July 1976, when the CTA installed the "jaws," and October 1977, when Lee was electrocuted. R. 722-23, 729, 1262; *see also* Pl. Ex. 20, pp. 1a-1c, Pl. Ex. 12, R. 725 1196-97.

After evidence of the ten prior incidents had been repeatedly introduced, Respondent's attorney agreed to accept the CTA's pretrial offer to stipulate to notice of prior accidents having occurred. R. 694-95. He did so, however, only after the CTA would agree that the stipulation could be couched in terms of the CTA's having "reasonably anticipated" the presence of trespassers on the right-of-way at grade level. R. 695.

Lee's Intoxication

At trial, it was undisputed that Lee had a blood alcohol level of 0.341. R. 1278. Respondent's attorney stated that Lee was "intoxicated and we have to live with that." R. 113; *see* R. 240.

Two experts, both board certified toxicologists, testified that Lee was egregiously impaired as a result of his intoxication. Respondent's expert testified that Lee was "grossly intoxicated." Evans Evid. Dep. at 44; *see also id.* at 14, 46. The CTA's expert testified that, based on Lee's 0.341 level of blood alcohol concentration and his

weight of 131 pounds, he had consumed "somewhere between 13 and 14 drinks" each containing or being "about one shot of [an] alcoholic beverage, 12 ounces of beer or a four ounce glass of wine." R. 1271-72.

Both experts agreed that their opinions were consistent with a chart prepared by Dr. Kurt Dubowski, Evans Evid. Dep. at 23; R. 1275; Def. Ex. 1A, which, based on blood alcohol concentrations, identifies seven categories of intoxication: 1) sobriety; 2) euphoria; 3) excitement; 4) confusion; 5) stupor; 6) coma; 7) death. R. 1277; Def. 1A. With his 0.341 blood alcohol concentration, Lee was in the "stupor" category. R. 1278. At that level, he would have had no coordination, his brain was unable to send impulses out accurately, and he was incapable of purposeful motion. R. 1277, 1278-79; *see also* R. 1283-84, Evans Evid. Dep. at 18-19, 23-24, 49-50, 51-53. Additionally, Lee's vision and ability to focus would have been greatly diminished. *Id.*

Although Respondent's liability expert, Charles Heilman, testified that the CTA should have installed additional warnings at the Kedzie crossing, he also conceded that Lee's intoxication would have negated the effect of any additional warnings posted by the CTA. Specifically questioned whether there should have been a sign warning, "Do not enter if you are intoxicated," Mr. Heilman answered: "Well it wouldn't do any good. He probably couldn't read it." R. 999. The CTA's attorney asked, "If a person had a blood alcohol level of .34, between a stupor and a coma, would you expect an individual like that to be able to notice, read, understand and heed a warning, no matter what warning it is?" R. 999. Mr. Heilman responded, "Probably not." R. 1000.

Jury Instructions

At the conclusion of all the evidence, Respondent amended her Fourth Amended Complaint to allege that the CTA

"[u]sed and transmitted electricity without safety measures." R. C758; R. 1287, 1301. On the basis of that amendment, Respondent tendered Illinois Pattern Jury Instruction No. 120.03—the "**Duty of Owner or Occupant to a Trespasser . . . Injury Caused by Owner's Activities**":

> The CTA owes a trespasser no duty until his presence on the premises is either known or from facts and circumstances should reasonably have been anticipated. Then the CTA owes him the duty not to wilfully or wantonly cause him injury.
>
> The CTA was under a duty not to wilfully or wantonly injury [sic] Sam [sic] Yeul Lee.
>
> However, if the CTA knows or from facts known to it should reasonably anticipate the presence of Sang Yeul Lee in a place of danger, it is then under a duty to use ordinary care not to injury [sic] Sang Yeoul [sic] Lee.

R. C793; *see* Illinois Pattern Jury Instructions (Civil) No. 120.03 (2d ed. 1971) [hereinafter IPI (Civ.)].

The CTA argued that the third rail was a condition on the land, not part of an activity, and tendered IPI Instruction 120.02, "**Duty . . . to a Trespasser—Injury Caused by Condition of the Premises,**" which would instruct the jury that the CTA "was not under a duty to see that its premises were reasonably safe for Sang Yeul Lee." R. C819; *see* IPI (Civ.) No. 120.02.

Ruling the CTA was engaged in the activity of conducting electricity, R. 1287-1301, the trial court rejected the CTA's instruction, gave Respondent's instruction, and further instructed the jury that the CTA had a duty, "before and at the time of the occurrence, to use ordinary care for the safety of the decedent," R. C794, 1312. In closing arguments, Respondent's attorney told the jury that because the CTA had stipulated that it could "reasonably anticipate that pedestrians were coming into the property

at grade level," *see supra* p. 5, ordinary care was the standard to be applied. R. 1367, 1367-68.

The jury returned a general verdict of $3 million, which was reduced by half to reflect a finding of 50% fault on Lee's part. R. C828. In response to a special interrogatory, the jury also found that the CTA's conduct had not been willful or wanton. R. C829. The jury made no other specific fact findings.

Illinois Appellate Court

The CTA appealed to the Illinois Appellate Court, contending, among other things, that the jury had been improperly instructed and that insufficient and improper evidence and trial error compelled a new trial.

The appellate court reversed the jury's verdict and entered judgment for the CTA. The appellate court held that the trial court had improperly given the jury the instruction that applies to the duty of ordinary care owed an anticipated/discovered trespasser for injury arising from a dangerous ***activity*** being conducted on the land. A51, A53-55. The appellate court held that, under Illinois law, Lee was not injured as the result of a dangerous activity being conducted on the CTA's right-of-way and the trial court should have instructed the jury that the CTA had only a duty to refrain from willfully and wantonly harming Lee—i.e., the duty owed trespassers who are injured by a ***condition*** on the land. A55. Because the jury had specifically found that the CTA's conduct had not been willful or wanton, the appellate court entered judgment for the CTA without remanding for a new trial. *Id.* The appellate court denied Respondent's Petition for Rehearing on November 20, 1991. A58.

The Illinois Supreme Court

The Illinois Supreme Court granted Respondent's Petition for Leave To Appeal and on October 22, 1992, filed its decision. The Illinois Supreme Court affirmed the appellate court's holding that the jury had been improperly instructed, but reinstated the jury's verdict and restored the judgment. The court reinstated the verdict and restored the judgment by creating, and then applying to the CTA, a new exception to Illinois's common law of trespass. A2, A12, A17. Presumptively based on section 337 of the Restatement (Second) of Torts, the court's new exception imposes a new duty of ordinary care to properly warn reasonably anticipated trespassers of dangerous conditions.[1] *See* A12; *but see infra* note 3.

Applying its new duty to the facts of this case, the Illinois Supreme Court concluded that, based on the jury's general verdict, the jury had found that (1) the CTA breached the court's newly-created duty of ordinary care to properly warn by providing inadequate warnings and (2) those inadequate warnings were—despite Lee's blood alcohol level of 0.341 and his inability to read English—

[1] Section 337 of the Restatement (Second) of Torts embodies the duty to warn that is owed trespassers actually discovered in a place of danger. Restatement (Second) of Torts § 337 comment *a* (1965); *see* A34-35 (Moran, J., dissenting). Acknowledging that Lee was not a discovered trespasser and citing *Webster v. Culbertson*, 761 P.2d 1063 (Ariz. 1988), the Illinois Supreme Court declined to follow comment *a* to section 337 and ruled that section 337 applied because Lee was a "reasonably anticipated" trespasser. A8. The court held that the CTA owed Lee a duty of ordinary care to properly warn, A12, either (1) on the basis of the CTA's "stipulation," A9-10, *but see supra* p. 5, or alternatively, (2) because the evidence at trial established that the CTA had knowledge of "10 prior accidents which occurred between 1948 and 1975 on the 3.2 mile segment of track where the CTA's third rail ran at grade level," A10.

both the cause-in-fact and proximate cause of his death. *See* A14-17. The court stated:

> Here, the CTA failed to adequately warn that its third rail transmitted 600 volts of electric current. In addition to that fact, plaintiff's decedent was intoxicated to a degree which placed him at the "stupor" level of intoxication. Yet we cannot conclude that plaintiff's decedent's injuries would have occurred without the CTA's failure to adequately warn of the electric current in the rail. Significantly, plaintiff's decedent apparently had the presence of mind to seek the privacy and shelter of the surrounding buildings at the crossing before relieving himself.

A16.

The CTA's Petition for Rehearing

The CTA petitioned the Illinois Supreme Court for rehearing, contending that, if the court's decision were allowed to stand, it would violate the CTA's right to due process. *See* A75-76. The Illinois Supreme Court's decision imposed liability under the new duty on the basis of fact findings which were not, and could not have been, made by the jury:

> In its opinion, this Court finds that because the jury returned a general verdict for the plaintiff and because it was instructed that the CTA "failed to adequately warn of the electricity in its third rail," there was a "jury[ ] finding that the CTA breached its duty to adequately warn of electricity in its third rail." . . . What the Court overlooks in reaching this finding is that . . . even though the jury returned a general verdict, it was not given a specific instruction that the CTA owed ***only*** a duty for reasonable care to warn of the condition.
>
> . . . .
>
> Because the jury was given both duty of care and warning instructions that did not reflect the actual

> duty owed the plaintiff's husband, the jury could not—and did not—make a finding that the CTA breached the duty that the Court has now recognized in adopting section 337. If this Court does not reconsider and reject the new duty that it has created, it must allow a jury to properly consider whether the CTA breached that new duty. Failure to spell out that new duty (if it is intended to be more expansive than that found in section 337) and failure to grant a new trial would constitute a grave denial of due process.

A75, A76. The CTA also suggested that its right to a fair trial was denied when the court disregarded the uncontroverted evidence at trial regarding the effects of Lee's intoxication and made insupportable inferences which were contrary to this evidence. *See* A76-77. Asserting that the new duty was undefined, the CTA requested that, in the event the court affirmed its new duty and extended liability, it clarify what the new duty specifically entails and give the duty prospective application. A84-88.

State Farm Fire & Casualty Insurance Company filed an *amicus* brief in support of the CTA's petition. A copy of State Farm's brief is reprinted in the Appendix at A90-109.[2] In that brief, State Farm noted that the Illinois Supreme Court's decision in this case directly conflicts with one decided in July 1992 in which the court, confronted with facts indistinguishable from those in *Webster v. Culbertson*, 761 P. 2d 1063, *see supra* note 1, held that the due process clause of the Fourteenth Amendment prohibited the imposition of liability on the landowner. A102-04.

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[2] Commonwealth Edison and the Illinois Telephone Association also filed *amicus* briefs in support of the CTA's petition.

REASONS TO GRANT THE WRIT

The procedural due process question in this case is whether the judgment entered by the Illinois Supreme Court violated the CTA's Fourteenth Amendment right to a fair trial. The answer to this question must be in the affirmative because Illinois's highest court has created a new duty, determined breach, and imposed liability in case where the jury was not instructed that such a duty was owed and where the jury neither made, nor under the evidence adduced at trial could have made, findings to support the court's determination of breach and imposition of liability. The answer must be in the affirmative because this Court has consistently found constitutional violations in cases involving analogous situations—*e.g.*, when liability was imposed in the absence of any supporting evidence and/or based on erroneous jury instructions. The judgment of the Illinois Supreme Court and those cases compel this Court's exercise of its supervisory powers and review.

The Illinois Supreme Court violated the CTA's substantive due process rights in two ways. One, the precise duty that the court adopted in this case is one that the same court refused to adopt three months earlier in July 1992 on the grounds that imposition of such a duty would violate a landowner's substantive due process rights under both the federal and Illinois constitutions. Two, in not only adopting that very duty but in determining its breach as well, the court arbitrarily and capriciously ignored and negated the CTA's right under the Illinois constitution to a trial by jury and its right under the Fourteenth Amendment not to be deprived of its property without the due process of law.

The Illinois Supreme Court's imposition of liability in this case undermines the public's belief in the legitimacy of the courts. The court's radical expansion (if not abolition) of well-developed and functional exceptions to the common

law of trespass in Illinois, its abandonment of *stare decisis*, and the unconstitutional manner in which it determined breach and imposed liability based on its new duty threaten to undermine the public's belief in the stability, impartiality, and fairness of the judicial system.

Not only does the decision of the Illinois Supreme Court in this case undermine public confidence in the judicial system, but it reaches beyond the borders of Illinois and the rights of CTA. If allowed to stand, the court's decision in this case will serve as this Court's tacit sanction of the constitutional violations that occurred in this case and as an invitation to the highest courts of other states to create duties, determine breach, and impose liability in violation of the due process guarantees of the Fourteenth Amendment. The rights of all are potentially imperiled. This Court's supervisory powers are needed and must be exercised.

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE ARBITRARY AND CAPRICIOUS DECISION OF THE ILLINOIS SUPREME COURT VIOLATED THE CTA'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

Until the decision in this case, landowners in Illinois owed adult trespassers who were undiscovered and not trespassing with the implied consent of the landowner only a duty not to wilfully and wantonly injure them. *See* A6. As a result of the Illinois Supreme Court's decision in this case, all that has changed.

Presumptively a duty of ordinary care to "properly" warn "reasonably anticipated" trespassers of the third rail, A12,[3] the duty fashioned by the court from section

[3] *But see* A15 ("The evidence adequately supports the jury's finding that the CTA breached its ***duty to adequately warn of elec-***

(Footnote continued on following page)

337 of the Restatement (Second) of Torts and *Webster v. Culbertson*, *see supra* note 1, is a far different duty—however defined, *see supra* note 3—both from the duty which the CTA actually owed Lee on October 22, 1977 and from the duty of ordinary care not to injure which the jury at trial was erroneously instructed that the CTA owed Lee.

The duty that the court found breached was not the duty of ordinary care that it presumptively adopted, but a duty of extraordinary care that it in fact applied. *See infra* pp. 15-16. However defined, *see supra* note 3, the new duty fashioned by the court in this case was not the duty on which the jury based its general verdict for Respondent at trial, and the court's determination of breach and causation are without basis in the record.

As this Court observed in *Wolff v. McDonnell*, 418 U.S. 539 (1974), "The touchstone of due process is the protection of the individual against arbitrary action of government." *Id.* at 588. And as Fifth Circuit observed in *Williams v. Tooke*, 108 F.2d 758 (5th Cir.), *cert. denied*, 311 U.S. 655 (1940), "if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the court so deciding has jurisdiction over the suit, the judgment may be in violation of the 14th Amendment." *Id.* at 759 (citing *Postal-Tele. Cable Co. v. Newport*, 247 U.S. 464 (1917)).

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[3] *continued*

tricity in its third rail"); A16 ("the CTA failed ***to adequately warn that its third rail transmitted 600 volts of electric current,***" "the CTA owed plaintiff's decedent ***a duty to adequately warn of the danger***"); A17 ("The CTA breached its duty by failing ***to warn of the presence and location of the third rail, and that the electric current warned of was transmitted via that rail***") (emphases added). *See also* A7 ("We find compelling . . . plaintiff's invitation to adopt Section 337 [and] to hold that [the CTA] should be held to a ***duty of ordinary care to protect and/or warn the trespasser***") (emphasis added).

By creating a duty that it never defined, applying a duty with no basis in law, determining breach and causation without a new trial, and substituting a general verdict in another trial for a real verdict in a new trial, the Illinois Supreme Court has acted arbitrarily and capriciously and in so doing, irreparably and impermissibly violated the CTA's due process rights. The court's violations of those rights cannot be allowed to stand.

A. The Illinois Supreme Court's Failure To Define Its New Duty Constituted a Denial of the CTA's Due Process Rights

Despite its formal adoption of "a duty of ordinary care to properly warn of third rail," A12, the court premised liability on its belief that

> the risk of serious injury or death to a pedestrian [sic] as a result of contact with the third rail located at grade level, in close proximity to a sidewalk, outweighs any burdens associated with ***more formidable safeguards or, at the least, adequate warnings.***

A13 (emphasis added). If the duty imposed was "at the least" to warn, it was not just a duty to "properly" warn.

The duty to warn that the court actually applied was a duty found breached because "the third rail was not marked, nor was there any indication that the electric current, of which the posted signs warned, was carried in any of the grade level rails," A14, and because "the CTA failed to adequately warn that its third rail transmitted 600 volts of electric current," A16. It was a duty owed ***and breached*** "notwithstanding the decedent's condition or level of mental functioning." A14. In other words, the duty applied (if not adopted) by the court was a duty of extraordinary care not only to warn undiscovered adult trespassers to keep out and of danger and electric current, but to warn undiscovered, incompetent adult trespassers of precise locations and actual voltage as well.

The extraordinary duty applied by the Illinois Supreme Court in this case is one without basis either in section 337 of the Restatement (Second) of Torts or in Illinois law.

Owed to trespassers whose actual presence is discovered or anticipated in a place of danger, *see supra* note 1, A33-37, A61-65, the duty found in section 337 of the Restatement (Second) of Torts is one requiring a possessor of land "to exercise ***reasonable*** care to warn [adult trespassers] of the condition." Restatement (Second) of Torts § 337 (1965) (emphasis added). "Reasonable care" to warn of the condition does not encompass giving incompetent adult trespassers extraordinary warnings of actual risks.

Until the decision in this case, Illinois courts had emphatically rejected the imposition of extraordinary duties to warn based on subjective criteria. In, for example, *Booth v. Goodyear Tire & Rubber Co.*, 224 Ill. App. 3d 720, 587 N.E.2d 9 (3d Dist.), *appeal denied*, 145 Ill. 2d 632, 596 N.E.2d 626 (1992), a case involving a mentally disabled thirteen-year-old trespasser who was injured when he contacted electric power lines, the court found the plaintiff's

> subjective understanding of the risk of contacting power lines [was] irrelevant. As a matter of ***law***, plaintiff is deemed to have appreciated the risk involved with contacting power lines even though subjectively the plaintiff might not actually understand the danger. Defendants are not expected to foresee the unique mental and physical limitations of a individual minor in terms of his particular ability to appreciate the risk of harm.

224 Ill. App. 3d at 725, 587 N.E.2d at 13 (emphasis in original) (duty owed to child trespassers under Restatement (Second) of Torts § 339).

To the extent the court in this case defined the duty it adopted, the CTA was entitled to a new trial based on that duty. To the extent that duty remains vague, undefined, and dependent on subjective factors for actual

definition, no Illinois landowner can ever be sure of the duty owed "reasonably anticipated" trespassers or whether it has been breached. Like the CTA, they, too, will be deprived of their right to a fair trial.[4]

B. The Illinois Supreme Court Violated the CTA's Right to a Fair Trial by Finding that the CTA Breached a Duty of Ordinary Care to Warn Trespassers

The CTA was also deprived of a fair trial because it was only by adopting and applying a duty of extraordinary care to warn that the Illinois Supreme Court could conclude that the there was any basis for breach in the record and, as a result, justification for its new imposition of liability. As a matter of law, just as there was no such duty, *see supra* pp. 15-16, there was no breach, and the court's imposition of liability based on the jury's general verdict was without justification.

That the five signs posted at the right-of-way on the east side of Kedzie, ***each*** of which warned "**DANGER**," "**ELECTRIC CURRENT**," and "**KEEP OUT**" ***were*** legally adequate is reflected in *Kirschner v. Louisville Gas & Electric Co.*, 743 S.W.2d 840 (Ky. 1988), a child trespass case. In *Kirschner*, the minor plaintiff was severely injured when electricity in transmission lines attached to a tower he was climbing arced. Affirming the entry of summary judgment for the defendant, the Kentucky Supreme Court held that a lone "DANGER HIGH VOLTAGE" sign on the tower, *id.* at 842, was "sufficient warning of danger," *id.* at 845.

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[4] Because of the court's multiple definitions of the duty imposed, the CTA in its Petition for Rehearing asked the Illinois Supreme Court to clarify the duty so that the CTA and other Illinois landowners would know what conduct is expected of them. A84-86. The court's refusal to do so suggests a desire to retain the duty's current, and unquestionably unconstitutional, elasticity.

Like the single "DANGER" sign in *Kirschner*, the five "DANGER" signs on the east side of Kedzie at the CTA's right-of-way were sufficient and adequate warnings. As a matter of law and fact, the jury could not, and did not, find that the CTA breached a duty of ***ordinary*** care not to injure Lee by " 'fail[ing] to ***adequately*** warn of electricity in its third rail.' " A14 (emphasis added). As the court's opinion makes abundantly apparent, based on the record, the CTA could only have breached a duty of ***extraordinary*** care by failing to provide ***detailed and additional warnings*** of the third rail's precise location and specific voltage in a manner and means that would have been comprehensible to an incompetent adult trespasser. *See supra* p. 15. The jury was never instructed that such a duty was owed and never made such a finding of breach.

Because the extraordinary duty of care that the court applied in this case was never considered, or its breach determined, by a jury, the court's imposition of liability was without justification, and the CTA was deprived of a fair trial. This Court's review is required.

C. The Illinois Supreme Court Violated the CTA's Right to a Fair Trial When It Ignored Uncontradicted Evidence and Held That Inadequate Warning Was the Proximate Cause of Death

Central to the violation of the CTA's due process rights is the Illinois Supreme Court's determination of causation—i.e., its determination that if the CTA had somehow complied with the extraordinary duty of care to warn that the court has now imposed, Lee would not have entered the right-of-way and relieved himself on the third rail. Because the court's determination was based totally on inference and is completely contrary to undisputed evidence at trial, the court's imposition of liability based on it was arbitrary and capricious and a violation of the CTA's right

to a fair trial. *See Drope v. Missouri*, 420 U.S. 162, 174-75, (1975), *infra* pp. 21-22.

Uncontradicted evidence at trial established that Lee's gross intoxication would have prevented him from comprehending any type of warning sign. It was undisputed that at the time of his death, Lee was grossly intoxicated, with a blood alcohol level of 0.341, or three times the legal limit for intoxication under the Illinois Motor Vehicle Code. *See* Ill. Rev. Stat. ch. 95½, ¶ 11-501.2(b)(3) (1991) (an individual is presumed to be under the influence when his or her blood-alcohol concentration is 0.10 or greater). The Respondent's experts testified that Lee's extreme intoxication would have prevented him from reading and understanding even warnings printed in Korean. As dissenting Justice Heiple noted,

> [w]ith a 0.341 concentration of blood alcohol, however, it is questionable whether it would have mattered if the signs had been printed in Korean or even in pictures. The decedent was virtually blind drunk.

A38 (Heiple, J., dissenting).

Incredibly, despite uncontroverted evidence that Lee was literally intoxicated beyond comprehension, the Illinois Supreme Court found that "the CTA's failure to adequately warn of the electric current in the third rail was a proximate cause of plaintiff's decedent's injuries." A17. What the court—also incredibly—calls "the ***jury's*** finding on cause in fact," A16, is nothing more than the ***court's*** own *de novo* determination of cause in fact—a determination based on the ***court's*** own improper inferences:

> [P]laintiff's decedent was intoxicated to a degree which placed him at the "stupor" level of intoxication. Yet we cannot conclude that plaintiff's decedent's injuries would have occurred without the CTA's failure to adequately warn of the electric current in the rail. ***Significantly, plaintiff's decedent apparently had the presence of mind to seek the privacy***

> ***and shelter of the surrounding buildings at the crossing before relieving himself. We do not find the jury's finding on cause in fact so palpably erroneous as to warrant a different result.***

A16 (emphasis added).[5]

That the court's inferences were improper, did not establish causation, and deprived the CTA of a fair trial has been confirmed both by Illinois courts and by this Court.

The court's inferences were improper and did not establish causation because they disregard the undisputed testimony of the experts on the issue of Lee's intoxication. Where "the testimony of a witness is neither contradicted, either by positive testimony or by circumstances, nor inherently improbable, and the witness has not been impeached, that testimony cannot be disregarded even by a jury." *People ex rel. Brown v. Baker*, 88 Ill. 2d 81, 430 N.E.2d 1126, 1127 (1981).[6]

The court's inferences were improper and did not establish causation because they are inferences from inferences

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[5] Having determined "cause in fact" based on inference, the court in its opinion premises a finding of legal causation on its new duty of extraordinary care ***and*** on the CTA's actual warnings:

> The mere fact that the CTA placed several warning signs at the crossing supports a finding that it was foreseeable that serious injury or death would result from a failure to warn of the danger. Thus, it was likewise foreseeable that injury would result if the warnings were inadequate. Accordingly, we find no error in the jury's finding of legal causation.

A16.

[6] *See also Novey v. Kishwaukee Community Health Services Ctr.*, 176 Ill. App. 3d 674, 680, 531 N.E.2d 427, 431 (2d Dist. 1988) (defendants entitled to judgment *nov* where jury's finding was contrary to a witness' undisputed testimony); *Aluminum Co. of Am. v. Home Can Mfg. Corp.*, 134 Ill. App. 3d 676, 683, 480 N.E.2d 1243, 1248 (1st Dist. 1985) ("unimpeached testimony may not be arbitrarily or capriciously rejected" by a trial court).

and without support in the record. The court inferred that Lee had cognitive ability sufficient enough for him to be deterred from entering the CTA's right-of-way by "adequate" signs[7] from unsupported inferences that (1) because he was on the right-of-way when he urinated, he "had the presence of mind to seek privacy and shelter," A16, and (2) because he had the presence of mind to "seek privacy and shelter," *id.*, he would have been deterred by different warnings. There was no evidence to support either inference, and a fact may not be reasonably inferred when the only occasion for an inference is a complete absence of evidence to support it. *Coulson v. Discerns*, 329 Ill. App. 28, 32, 66 N.E.2d 728, 730 (4th Dist. 1946).

Not only were the court's inferences improper and insufficient to establish causation, but they deprived the CTA of a fair trial. This Court has found constitutional infirmity where liability is imposed in the absence of any supporting evidence.[8] Where the issue is whether the inferences drawn from the undisputed evidence violate a defendant's right to a fair trial, this Court should independently analyze the facts of the case:

> In such circumstances we believe it is "incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." . . . "When the corrective process is provided by the state but error, in relation the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings." . . .

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[7] An "adequate" sign would have warned that "[the] third rail transmitted 600 volts of electric current." A16.

[8] *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448, 461-63 (1975) (certiorari granted, state court verdict reversed, case remanded where jury was improperly instructed that *New York Times* standard applied and a finding of fault, an element under state libel law, had not been put to the jury or ever determined by the state court).

Drope, 420 U.S. at 175 (citations omitted) (state conviction reversed where trial court determined defendant's competency based upon improper inferences from undisputed evidence). As in *Drope*, this Court's review and independent analysis are needed and mandated.

II. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE ILLINOIS SUPREME COURT DEPRIVED THE CTA OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW IN ITS IMPOSITION OF DUTY AND DENIAL OF A TRIAL BY JURY

Both in its imposition of duty and in its denial of a trial by jury, the Illinois Supreme Court violated the substantive due process guarantees of the Fourteenth Amendment as well.

A. The Illinois Supreme Court's Imposition of Duty in this Case Constituted an Unconstitutional Denial of Due Process

However defined, the duty imposed by the Illinois Supreme Court in this case is not the duty found in section 337 of the Restatement (Second) of Torts. *See supra* notes 1, 3. To the degree it is the duty adopted by the Arizona Supreme Court in *Webster*, *see supra* note 1, it constitutes an unconstitutional denial of substantive due process under the Illinois Supreme Court's July 1992 decision in *Hutchings v. Bauer*, 149 Ill. 2d 568, 599 N.E.2d 934 (1992).

In *Webster*, evidence indicated that a river wash, which the possessor had closed off with a concealed barb wire fence to stop trespassing onto her property, was regularly used by pedestrians, motorists, and cyclists, and that an equestrian trail crossed the wash less than fourteen yards from the spot where the wash entered the defendant's property. 761 P.2d at 1064-65.

The plaintiff in *Webster* was an equestrian who was injured when he attempted to enter the defendant's prop-

erty and ran into the concealed barbed wire fence. Like the defendants in *Webster*, the defendants in *Hutchings* had erected a barrier to keep travelers off their property. The barrier in *Hutchings* was twenty-one feet from where a curve in the road passed a riding track on the perimeter of the defendants' property. Like the defendant in *Webster*, the defendants in *Hutchings* were "aware of the fact that, over the years, numerous vehicles had left the travelled way while riding around the curve . . . and had crashed through their fence [around the property]." 149 Ill. 2d at 569, 599 N.E.2d at 935. Like the plaintiff in *Webster*, the motorcyclist/plaintiff in *Hutchings*, once he had left the road, unknowingly headed straight toward the barrier (which he could not see) and was injured.

There was more evidence of prior deviation/would-be trespass from the road in *Hutchings* than in *Webster*. The barrier in *Hutchings* was only twenty-one feet rather than fourteen yards from the road and was as least as hidden and dangerous as the barbed wire in *Webster*. Neither the *Webster* plaintiff nor the *Hutchings* plaintiff was a trespasser until he hit the barbed wire/barrier. Even so, the Illinois Supreme Court in *Hutchings* did ***not*** adopt the duty to warn reasonably anticipated trespassers that the Arizona Supreme Court had adopted in *Webster*. Refusing to recognize any duty or impose liability on the defendants, the Illinois Supreme Court in *Hutchings* held:

> The defendants were under no duty to dedicate and donate their land to the public without compensation as a travelled way. ***To hold otherwise would constitute a denial of substantive due process under our Federal and State Constitutions*** (U.S. Const. amend. V, Ill. Const. 1970, art. I, sec. 2).

149 Ill. 2d at 571, 599 N.E.2d at 935-36 (emphasis added).

Constitutionally, the Illinois Supreme Court's holding in *Hutchings* and its decision in this case cannot be reconciled. If, like the plaintiff in *Webster*, the plaintiff in *Hutch-*

ings had been labeled a trespasser (which he was), he would have been a reasonably anticipated trespasser. Under the duty adopted in *Webster* and imposed in this case, the defendants would have been liable to him for an injury caused by a hidden dangerous artificial condition on their land because they did not warn of the hidden barricade. The duty specifically rejected in *Hutchings* but adopted in this case is no less a denial of substantive due process. It demands review.

B. The Illinois Supreme Court's Denial of the Right to a Trial by Jury as Guaranteed by the Illinois Constitution Constituted an Unconstitutional Denial of Due Process

Although acknowledging that "[q]uestions concerning breach of a duty and proximate cause are factual matters for the jury to decide," A14, the Illinois Supreme Court refused to remand this matter for a new trial even though the duty it created and applied had never been tried. By refusing to remand the case for a jury trial on issues of breach and causation, the court arbitrarily and capriciously denied the CTA its right to a trial by jury under the 1970 Illinois Constitution. In so doing, it deprived the CTA of its property without due process of law in violation of the Fourteenth Amendment.

The 1970 Illinois Constitution provides that "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate." 1970 Ill. Const. art. I § 13. In *Wright v. Central DuPage Hospital Association*, 63 Ill. 2d 313, 324, 347 N.E.2d 736, 740 (1976), the Illinois Supreme Court explained this right:

> "We have construed these words to mean the right of a trial by jury as it existed under the common law and as enjoyed at the time of the adoption of the respective Illinois constitutions. . . . The right of a trial by jury as it existed in common law is the right to

> have the facts in controversy determined, under the direction and superintendence of a judge, by the unanimous verdict of 12 impartial jurors who possess the qualifications and are selected in a manner prescribed by law."

Id. (citations omitted). Under federal and Illinois law, where a right to a trial by jury is granted by constitutional or statutory provision, it cannot be taken away or impaired by the courts. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959); *see People v. Smith*, 10 Ill. App. 3d 61, 64, 293 N.E.2d 465, 467 (3rd Dist. 1973). It is the province and duty of the Illinois courts to see that every litigant has a fair trial. *Osborn v. Lenard*, 99 Ill. App. 2d 391, 397, 240 N.E.2d 769, 772 (1968).

A new trial was compelled in this case because the jury was never instructed that the CTA owed "reasonably anticipated" undiscovered adult trespassers a specific duty of (extra)ordinary care to warn them in detail of specific risks. As this Court has held, where a jury has been improperly instructed, a court cannot presume that the jury relied only on proper instructions and disregarded improper instruction.[9] In addition, this case was not tried—and could not have been tried—under the new exception to the trespass rule subsequently created by the court. Again, as this Court has held, when a case is tried under an incorrect theory of law, the appropriate action is to reverse the judgment and to remand for a new trial.[10]

Nor was the jury's general verdict in this case sufficient to overcome the court's denial of the CTA's right

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[9] *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *Wilson v. Michel*, 224 Ill. App. 3d 380, 387, 586 N.E.2d 333, 339 (1st. Dist.), *appeal denied*, 145 Ill. 2d 645, 596 N.E.2d 638 (1992) (new trial granted where jury improperly instructed damages could be recovered for injuries not causally related to breach).

[10] *Greenbelt Coop.*, 398 U.S. at 11; *see Sparling v. Peabody Coal Co.*, 59 Ill. 2d 491, 496, 322 N.E.2d 5, 8 (1974).

to a trial by jury. This Court has long recognized that where the jury returns a general verdict after being instructed on both permissible and impermissible theories of recovery, the verdict must be reversed and the case remanded to the trial court. That reversal and remand are compelled was unquestionably established by this court in *Greenbelt Cooperative Publishing Association v. Bresler*, *see supra* notes 9, 10.

In *Greenbelt*, the trial court had erroneously instructed the jury on the elements of proof necessary for a finding of malice, a finding crucial to the imposition of liability. 398 U.S. at 11. Finding that the jury's general verdict prevented a determination of whether the jury found malice in a permissible manner, this Court reversed and remanded:

> The erroneous instructions to the jury would, therefore, alone be enough to require the reversal of the judgment before us. For when "it is impossible to know, in view of the general verdict returned" whether the jury imposed liability on a permissible or an impermissible ground, "the judgment must be reversed and the case remanded."

Id. at 11 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964)).[11]

The duty that the Illinois Supreme Court established in this case did not even exist when the case was tried. Both the Illinois Supreme Court and the Illinois Appellate Court agreed and held that, when this case ***was*** tried, it was tried under an erroneous theory of law. *See supra* pp. 8, 9. The CTA has never had its right to a trial by jury recognized and enforced in this case. The denial of that substantive right to due process must be rectified.

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[11] *Accord Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (reversed state court where a jury verdict was rendered on instructions misstating the law and, in an independent review of the evidence, Court found insufficient evidence of malice).

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE ILLINOIS SUPREME COURT'S UNCONSTITUTIONAL CONDUCT, IF UNRESTRAINED BY THIS COURT, WILL UNDERMINE THE PUBLIC'S CONFIDENCE IN THE JUDICIAL PROCESS AND ENCOURAGE THE HIGHEST COURTS IN OTHER STATES TO ENGAGE IN SIMILAR CONDUCT

If the Illinois Supreme Court's decision is allowed to stand, it will have a devastating impact on the public's perception of the legitimacy of the Illinois judiciary. The perception of legitimacy depends upon the public's confidence in the stability, impartiality, and fairness of the judicial system to administer the law with due process. The Illinois Supreme Court's arbitrary and capricious imposition of liability in this case undermines those principles.

Individuals, groups, agencies, organizations, businesses, and governments plan their affairs in reliance on basic due process principles, confident in the substance of the law and its even-handed application. Because the Illinois Supreme Court's decision in this case permits an outcome-oriented court of last resort to impose liability contrary to undisputed evidence, the rights of every individual, group, agency, organization, business, and government subject to the jurisdiction of Illinois courts to a fair trial and a trial by jury are jeopardized.

Individuals, groups, agencies, organizations, businesses, and governments also conform their conduct to the law and the principle of *stare decisis*. "Stare decisis represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations." *Molitor v. Kaneland Community Unit District*, 18 Ill. 2d 11, 37, 163 N.E.2d 89, 102 (1959), *cert. denied*, 362 U.S. 968 (1960) (Davis, J., dissenting). The Illinois Supreme Court's decision demonstrates that Illinois law can and will change whenever it suits the court.

The Illinois Supreme Court's decision also undermines the public's perception of the judiciary as impartial. If this decision is allowed to stand, there is nothing to prevent the Illinois Supreme Court from again creating a new duty, applying the new duty, and ignoring uncontradicted evidence, trying the case itself *de novo* in order to reach a politically or philosophically desired outcome.[12] In its course, this conduct can, and likely will, transgress other constitutional protections.

Because the Illinois Supreme Court's decision further invites the Illinois Appellate Court to use its powers to achieve desired outcomes rather than justice, the court's decision is of immediate concern to any individual, group, agency, organization, or business that now is, or someday may be, subject to the jurisdiction of the Illinois courts. Without a decision from this Court and an exercise of this Court's supervisory powers, there is nothing to compel the Illinois Supreme Court to conform its conduct to the due process requirements of the Fourteenth Amendment.

Without a decision from this Court and an exercise of this Court's supervisory powers, there is also nothing to prevent the highest state courts in other jurisdictions from following the lead of the Illinois Supreme Court. Without this Court's review, those courts will be similarly empowered to create new law, ignore principles of *stare decisis*, try factual issues *de novo*, and, in the process,

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[12] The court's obvious belief in the correctness of the outcome of its decision—i.e., an outcome requiring the CTA to pay for injuries occurring on grade level rights-of-way—is found in statements throughout its opinion. *See, e.g.*, A13 ("[T]he risk of serious death or injury to a pedestrian [sic] as a result of contact with a third rail located at grade level, in close proximity to a sidewalk, outweighs any burdens associated with more formidable safeguards or, at the least, adequate warning"); A12-13 ("[The] determination of the duty here . . . is properly reflective of the prevailing social policies").

nullify both the procedural and substantive due process guarantees of the Fourteenth Amendment.

IV. THIS COURT SHOULD GRANT THE WRIT FOR THE VERY REASONS IT HAS JURISDICTION OVER THIS MATTER: BECAUSE THE CTA'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY A STATE COURT OF LAST RESORT, THE CTA HAS NO OTHER REDRESS

This Court should grant the writ for the very reasons it has jurisdiction over this matter: because a defendant whose due process rights are violated by a state's highest court has only this Court to look to for redress. Because in this case the constitutional violation of the CTA's rights occurred when the Illinois Supreme Court unexpectedly changed Illinois law[13] and imposed liability on the CTA

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[13] No Illinois law supported or foreshadowed the duty created and imposed by the Illinois Supreme Court in this case. A34-37 (Moran, J. dissenting). The unexpected and unforeseeable nature of the court's decision is reflected the several *amicus* briefs filed in support of the CTA's petition for rehearing. *See* State Farm *Amicus* Brief at A94, A101 ("[T]he court has radically changed the law, not only for the CTA, but for all possessors or real property in Illinois"; "Prior to the Court's decision in this case, Illinois homeowners and small businesses knew exactly where they stood in relation to adult trespassers as a matter of law[;] They no longer do"; "[T]he Court cites no Illinois law to support or justify the new class of trespassers and the expanded duty that it has created"); Illinois Telephone Association *Amicus* Brief at 3 ("ITA urges this Court to grant rehearing and reconsider its decision in light of the potential impact of the radical change in Illinois law . . . ."); Commonwealth Edison *Amicus* Brief at 4-5, 11 ("The Court's holding represents a very significant change from the general rule that the owner owed no duty to trespassers except to refrain from willful and wanton misconduct[;] Moreover, it is not supported by any relevant authority"). This radical change was also noted in the Illinois Supreme Court's dissenting opinions. *See* A34-35 ("With today's decision, the majority has carved out yet another exception to the trespasser rule. . . . In this, it relies upon the reasoning of the only jurisdiction which has previously adopted section 337 without accepting the interpretation of comment a").

for the breach of duty that never before existed, the CTA was deprived of any other forum, other than this Court, in which to assert its rights and have its constitutional claims reviewed.

This case falls plainly within the exception to the general rule that a federal question must be raised before the lower state courts in order for it to be heard by the United States Supreme Court on a petition for certiorari:

> [W]hen the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance.

Saunders v. Shaw, 244 U.S. 1163, 1165 (1916).[14]

This is precisely a case where a state's court of highest jurisdiction rendered a decision that was at once unexpected and unconstitutional. It is a decision compelling this Court's review and reversal.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Supreme Court of Illinois to review the court's judgment and opinion.

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[14] *See also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313, 319-20 (1930); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 218 U.S. 74, 77-79 (1929).

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APPENDIX

In the
Supreme Court of Illinois
October 22, 1992

(No. 71304. — Judgment reversed.)

JAE BOON LEE, Adm'x of the Estate of Sang Yeul Lee, Deceased,

Appellant,

v.

THE CHICAGO TRANSIT AUTHORITY,

Appellee.

Opinion Filed October 22, 1992. — Rehearing denied January 7, 1992.

JUSTICE FREEMAN delivered the opinion of the court:

Plaintiff, Jae Boon Lee, administratrix of the estate of Sang Yeul Lee, brought a wrongful death action in the circuit court of Cook County against defendant, Chicago Transit Authority (CTA), to recover damages for the death of her husband, who was electrocuted while on land owned by the CTA. Count I of plaintiff's fourth-amended complaint alleged that the CTA was negligent in failing to guard and warn of the existence of its street-level electrified third rail; Count II alleged willful and wanton conduct. The jury returned a verdict in the amount of $3 million for plaintiff on the negligence count, but reduced the award by 50% based on decedent's own negligence.

The CTA appealed, contending that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict; that insufficient and improper

evidence and trial error compelled a new trial; and that the jury's apportionment of fault and award of damages were not supported by the evidence. The appellate court reversed (205 Ill. App. 3d 163), and entered judgment in favor of the CTA. This court granted plaintiff's petition for leave to appeal (134 Ill. 2d R. 315).

The Illinois Trial Lawyers Association, the Illinois Association of Defense Trial Counsel, and Commonwealth Edison have filed briefs as *amici curiae*. The Illinois Trial Lawyers Association urges this court to affirm the trial court's decision; the Illinois Association of Defense Trial Counsel and Commonwealth Edison urge us to affirm the decision of the appellate court.

The issue presented for review is whether the jury was properly instructed that the CTA owed a duty of ordinary care to the decedent. We hold that the CTA did owe such a duty. Accordingly, we reverse.

FACTS

The following facts were adduced at trial. Plaintiff's decedent, Sang Yeul Lee (Lee), a 46-year-old Korean immigrant who was unable to read English, attended a party on the evening of October 21, 1977. On his way home, Lee entered a CTA right-of-way at the intersection of Kedzie Avenue and the Ravenswood railway line in Chicago, apparently, in order to urinate. The right-of-way was posted with signs, placed on a utility shed and on sawhorses at each side of the tracks, warning "Danger," "Keep Out," and "Electric Current." Parallel to the tracks and approximately 6½ feet from the sidewalk lay a street-level third rail. The purpose of the rail, which carried 600 volts of electricity, was to supply power to trains as they passed through the street-level crossing. The CTA had laid un-

even-edged boards, about six inches apart, called "jaws" on its right-of-way next to the sidewalk in order to make pedestrians aware that they were not meant to walk in that area. The uneven surface of the boards, also known as "cattle boards," makes it impossible for cattle and difficult for persons to walk atop them. The "jaws" at Kedzie Avenue extended between the end of the third rail and the sidewalk and were also placed on either side of the rail and between the tracks. Lee, whose blood-alcohol level of 0.341 placed him in the "stupor" classification of intoxication, made contact with the third rail and suffered fatal injuries. Thomas Wolgemuth, manager of facilities engineering and maintenance for the CTA, testified that Lee was neither permitted nor invited to be on the Kedzie Avenue CTA tracks at the time of his death. Plaintiff did not rebut this testimony.

Wolgemuth further testified that there are 19 grade, or street-level, crossings on the CTA transit lines where trains are powered by a third rail. At two of the grade crossings, located at Maple and Isabella Streets in Wilmette, the CTA installed safety measures consisting of automatic chain link fence-type gates across the track when the line was converted from overhead to third rail power in 1973. Before installing the "jaws" trespass system on the Ravenswood line in 1976, the CTA considered three alternative protective systems: gates such as those at the Wilmette grade crossings, which would remain closed except when a train was in the station; boards, which would cover the third rail on all but the train side; and catenary lines, which would carry the electric current overhead.

Plaintiff introduced evidence of 10 prior accidents which occurred between 1948 and 1975 on the 3.2-mile segment of track where the CTA's third rail runs at grade level.

One of the accidents occurred at the Ravenswood/Kedzie crossing in 1974, when a youth fell from a fence he was scaling onto the rail. The CTA offered to stipulate that it had notice of the accidents on that section of its line prior to 1977. Plaintiff, however, refused the stipulation. The CTA also presented evidence that there were no accidents on the section between July 1976, when it installed the "jaws," and October 1977, when Lee was electrocuted.

Charles Heilman, plaintiff's expert witness, testified that the segment of track in question is the only one in the United States or Canada where an electrically charged grade-level third rail is unguarded, uncovered or unfenced.

At the completion of testimony, the parties tendered instructions to the court. Plaintiff's instruction, Illinois Pattern Jury Instructions, Civil, No. 120.03 (2d ed. 1971) (IPI Civil 2d No. 120.03), was based on the theory that at the time of the accident, the CTA was engaged in the activity of conducting electricity. The CTA objected to the submission of this instruction, tendering in its stead IPI Civil 2d No. 120.02, reflecting the CTA's position that the electrified third rail was a condition, not an activity, on the land. Finding, however, that the CTA was engaged in the activity of conducting electricity, the court rejected the CTA's instruction, and instructed the jury in accordance with IPI Civil 2d No. 120.03.

The court specifically instructed the jury that "the CTA owes the trespasser no duty unless his presence on the tracks should have been reasonably anticipated, then the CTA owes him the duty not to wiilfully or wantonly cause him injury. The CTA was under a duty not to [injury] Sam [*sic*] Yeul Lee, however, if the CTA knows or to facts known to it should reasonably anticipate the presence of Sam Yeoul [*sic*] Lee in the place of danger, it is

then under the duty to use ordinary care not to injury [*sic*] Sam Yeoul [*sic*] Lee."

Following deliberations, the jury found that the CTA had breached its duty of care and was thus negligent. In response to a special interrogatory, the jury also found that the CTA's conduct was not willful or wanton. The jury returned a verdict for plaintiff which was proportionately reduced to reflect decedent's own negligence.

On appeal, the appellate court held that the trial court improperly gave the jury IPI Civil 2d No. 120.03, which states a landowner's duty of ordinary care to an anticipated trespasser when that trespasser is injured by an *activity* on the land. Rather, according to the appellate court, the trial court should have instructed the jury according to IPI Civil 2d No. 120.02, which states the duty of the landowner to refrain from willful and wanton conduct towards a trespasser who is injured by a *condition* on the land. Because the jury had specifically found that the CTA's conduct was not willful or wanton, the appellate court reversed without remanding for a new trial.

DISCUSSION

Negligence

Traditionally, the liability of a landowner in Illinois has been delineated in terms of the duty owed to persons present on the land. Whether a duty exists is a question of law for the court to determine. (*Gouge v. Central Illinois Public Service Co.* (1991), 144 Ill. 2d 535, 542.) Courts have found the duty of a landowner to vary according to whether the entrant on the landowner's property was classified as an invitee, a licensee or a trespasser, with the greatest care due to the invitee and the least to the

licensee or trespasser. However, in 1984, the Premises Liability Act (Act) (Ill. Rev. Stat. 1991, ch. 80, par. 301 *et seq.*) abolished the common law distinction between invitees and licensees. Section 302 of the Act states that "[t]he duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them." Because the Act is not retroactive, and because plaintiff does not dispute that Lee was a trespasser at the time of his death, we consider the Act only insofar as it reaffirms the views of the legislature concerning trespassers. Section 303 of the Act states unequivocally that "[n]othing herein affects the law as regards any category of trespasser." Ill. Rev. Stat. 1991, ch. 80, par. 303.

Generally, the rule in Illinois is that a landowner owes a trespasser only the duty to refrain from willfully or wantonly injuring him. (*Marcovitz v. Hergenrether* (1992), 302 Ill. 162, 167; *Votava v. Material Service Corp.* (1979), 74 Ill. App. 3d 208, 212.) However, as is the case with most rules, certain exceptions to that rule have evolved.

This court has long recognized that a landowner must use ordinary care to avoid injury to the trespasser who has been discovered in a place of danger on the premises. (*Briney v. Illinois Central R.R. Co.* (1948), 401 Ill. 181, 186; *Neice v. Chicago & Alton R.R. Co.* (1912), 254 Ill. 595, 603; *Illinois Central R.R. Co. v. Eicher* (1903), 202 Ill. 556, 560.) Courts have also found that the landowner owes a duty of ordinary care to those who are frequent trespassers in a limited area where the landowner knows or should know of their constant intrusion. (*Bernier v. Illinois Central R.R. Co.* (1921), 296 Ill. 464, 471; Restatement (Second) of Tort § 334 (1965).) Finally, an exception has been recognized where small children foreseeably intrude on the premises and are incapable of appreciating

the risk involved. In such cases, the landowner must exercise due care to remedy the dangerous condition or otherwise protect the children from injury resulting from it. (*Kahn v. James Burton Co.* (1955), 5 Ill. 2d 614, 625.) None of these exceptions, however, apply to the case before us.

In this appeal, plaintiff advances six separate approaches, any one of which, she maintains, supports the imposition of a duty on the CTA. We rely, for disposition of this matter, upon only one of plaintiff's theories. Thus, we need not recite or analyze each of the several theories advanced.

We note in passing, however, that one approach advanced by plaintiff is the abolition of the traditional distinctions between statuses of persons on the land with the same duty of care imposed for trespassers and nontrespassers alike. Plaintiff's argument in support of abolishment of the classifications is both extensive and compelling. However, the legislature's recent iteration on the licensee/invitee classification and its determination to leave intact the common law rule concerning trespassers (see Ill. Rev. Stat. 1991, ch. 80, par. 301 *et seq.*) persuades us that society yet finds some benefit in retaining the trespasser classification. Thus, we continue to decline abolition of the classifications. See *Pashinian v. Hartinoff* (1980), 81 Ill. 2d 377, 380-81.

We find compelling, however, plaintiff's invitation to adopt Section 337 of the Restatement (Second) of Torts as an additional exception to the trespasser rule. Relying on Section 337, plaintiff urges this court to hold that, if a landowner knows of or reasonably anticipates the presence of a trespasser in a place of danger, the landowner should be held to a duty of ordinary care to protect and/or warn the trespasser. The CTA maintains that

even if Section 337 applied, plaintiff could not prevail because there was "no duty, no breach of duty, and no proximate causation."

Section 337 of the Restatement, entitled "Artificial Conditions Highly Dangerous to Known Trespassers," provides:

> "a possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if
>
> (a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and
>
> (b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved." Restatement (Second) of Torts § 337, at 195 (1965).

In order to establish a duty under Section 337, the trespasser must first show that the landowner knew or had reason to know of the trespasser's presence. The phrase "reason to know" is defined in Section 12 of the Restatement to mean that the possessor of land has information from which a person of reasonable intelligence, or of the superior intelligence of the actor, would infer that the fact in question exists, or would govern his conduct upon the assumption that it does exist. Restatement (Second) of Tort § 12, at 19 (1965).

In satisfaction of the knowledge requirement, plaintiff relies on the CTA's stipulation that it could "reasonably anticipate" persons contacting the grade-level third rail. The CTA denies that it so stipulated, contending, instead, that it stipulated only to notice of the prior incidents.

We believe that the record belies any claim by the CTA that it did not stipulate to reasonable anticipation. During plaintiff's examination of Thomas Boyle, the head of the CTA's safety department, the following colloquy occurred:

> "MR. MALONEY [Plaintiff's Attorney]: Sir, would it be fair for me to say that CTA could reasonably anticipate people were contacting the third rail as it was at grade level and being killed or seriously injured before 1977?
>
> MR. BOYCHUCK [Defense Attorney]: We object. We have never denied that the CTA was aware of this—this was gone over before the jury and on a number of occasions now. And I believe that it is just being—improper at this point.
>
> MR. MALONEY: May we have a stipulation now then, too, that the answer to my question is 'yes'?
>
> THE COURT: I'll let the—
>
> MR. BOYCHUCK: Your Honor, I offered a stipulation before as to the notice of each of those incidents.
>
> MR. MALONEY: I'm sorry. I mean the way my question is phrased. Would you stipulate to the answer to that is 'yes'?
>
> MR. BOYCHUCK: Yes.
>
> THE COURT: Proceed.
>
> MR. MALONEY: And you had that reasonable anticipation as of October 22, '77 and before that, is that fair?
>
> WITNESS: The anticipation, sir, that somebody—
>
> MR. MALONEY: What Mr. Boychuck just stipulated to, you had that knowledge as of October '77, didn't you?
>
> WITNESS: Yes, sir. I believe that is one of the reasons—
>
> MR. MALONEY: Is the answer 'yes'?
>
> WITNESS:—that the barriers were put in, yes."

On three subsequent occasions during examination of various witnesses, Maloney, in phrasing his interrogatories, stated that the CTA had stipulated that it could reasonably anticipate persons coming into contact with the third rail at grade level prior to October of 1977. Maloney repeated the stipulation during his closing argument to the jury.

At no time did defense counsel object as to the correctness of Maloney's characterization of the stipulation. The evidence which the jury heard was that the CTA stipulated to reasonable anticipation. Regardless of its intent, the CTA cannot now contend that its stipulation was, instead, to notice.

Moreover, plaintiff presented evidence at trial of 10 prior accidents which occurred between 1948 to 1975 on the 3.2-mile segment of track where the CTA's third rail ran at grade level. Even had there been no stipulation to reasonable anticipation, a finding of reasonable anticipation could properly be supported by evidence of the CTA's knowledge of the prior accidents.

The CTA maintains, however, that comment a to Section 337 renders that provision inapplicable in this case because, as the comment makes clear, Section 337 requires "foreseeability in fact." Comment a to Section 337 states that "[t]he rule * * * relates only to the conditions under which a possessor of land is subject to liability to a trespasser whom he knows *to be about to* come in contact with a highly dangerous artificial condition maintained by him upon the land." (Emphasis added.) (Restatement (Second) of Tort § 337, comment a, at 195 (1965).) Our research has yielded only a few cases which have considered the applicability of Section 337. In *Johnson v. Rinker Materials, Inc.* (Fla. App. 1988), 520 So. 2d 684, *Payne v. M. Greenberg Construction* (1981), 130 Ariz. 338, 636 P.2d

116, and *Martin v. Jones* (1953), 122 Utah 597, 253 P.2d 359, the courts strictly interpreted the phrase "about to" in comment a and thereby found Section 337 inapplicable. However, the Arizona Supreme Court, in *Webster v. Culbertson* (1988), 158 Ariz. 159, 761 P.2d 1063, recently applied Section 337 and implicitly rejected comment a as a constraint on the applicability of the provision.

In *Webster*, the defendant bought a parcel of property and erected a barbed wire fence to keep out trespassers who were crossing her property. The fence crossed over a "wash" that the defendant knew was used for recreational purposes. An equestrian trail crossed the wash less than 14 yards from where the wash entered the defendant's property. The fence was not plainly visible, and the defendant had not posted warnings of its existence. Evidence in the record indicated that footprints, hoofprints and tire tracks were plainly visible in the wash.

The plaintiff, Webster, was injured when he rode his horse into the barbed wire fence. The defendant asserted that she had no reason to know of the plaintiff's proximity to the fence and, therefore, should not be held liable for the plaintiff's injuries. The Arizona Supreme Court rejected the defendant's argument that she had no reason to know of the plaintiff's presence. In essence, the court placed a duty to warn on a person who maintains a dangerous artificial condition when the person is aware of the possibility that others will come into dangerous proximity of the condition.

We agree with the Arizona court's application of Section 337 of the Restatement. In the case before us, the third rail is located a mere 6½ feet from the public sidewalk, which is adjacent to a busy city street. The CTA knew that pedestrians used the sidewalk to cross the

tracks, and certainly that pedestrians gained access thereby to those tracks. Thus, the CTA was aware that such persons could possibly come into dangerous proximity with the third rail. Therefore, we find that the CTA had "reason to know" of the presence of pedestrians upon its tracks. Restatement (Second) of Torts § 337(a) (1967).

In applying Section 337, we must also determine whether the third rail was of such a nature that the CTA had reason to believe that a trespasser would not discover it. At the time of the decedent's injuries, the warnings at the Ravenswood crossing indicated only that there was danger and that there was electric current. There was nothing which indicated either the existence or the location of the third rail, or that the electric current was carried in a rail. There were no markings on the third rail itself. Significantly, George Millonas, the CTA's director of plant maintenance, testified that the CTA trained its employees to recognize and to work around the rail. These facts amply support a finding that CTA had reason to believe that a trespasser would not discover the third rail.

We find that the requirements of Section 337 have been satisfied. Thus, we hold that the CTA owed plaintiff's decedent a duty of ordinary care to properly warn of the third rail.

We recognize that our holding today represents a slight departure from the traditional rule regarding the duty owed to trespassers. However, "[i]n the choice of competing considerations of societal policy, the need for protection against the reasonably foreseeable risk of death or severe personal injury outweighs the freedom of action that would otherwise characterize relation of the possessor of land to a trespasser." (*Imre v. Riegel Paper Corp.* (1957), 24 N.J. 438, 448-49, 132 A.2d 505, 510.) Our deter-

mination of the existence of a duty here, we believe, is properly reflective of the prevailing social policies.

Moreover, the legal concept of duty is not sacrosanct in itself. (*Renslow v. Mennonite Hospital* (1977), 67 Ill. 2d 348, 356.) Though the existence of a legal duty is ordinarily considered in terms of foreseeability of injury, the question of whether a legal duty exists is contingent upon a variety of factors. (*Kirk v. Michael Reese Hospital & Medical Center* (1987), 117 Ill. 2d 507, 526.) Considerations such as the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden upon the defendant must be taken into account. (*Deibert v. Bauer Brothers Construction Co.* (1990), 141 Ill. 2d 430, 438; *Illinois Housing Development Authority v. Sjostrom & Sons, Inc.* (1982), 105 Ill. App. 3d 247, 261-62.) Thus, duty is no more than an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. *Nelson v. Commonwealth Edison Co.* (1984), 124 Ill. App. 3d 655, 662.

Here, the close proximity of the third rail to the sidewalk significantly increased the likelihood of injury to pedestrians who used the sidewalk. At trial, the CTA presented evidence that alternate means of guarding the right-of-way against pedestrian entry could be problematic to install and maintain. That notwithstanding, we believe that the risk of serious injury or death to a pedestrian as a result of contact with a third rail located at grade level, in close proximity to a sidewalk, outweighs any burdens associated with more formidable safeguards or, at the least, adequate warning.

The CTA maintains, however, that even if Section 337 may be relied upon to impose a duty to warn, there was

no breach of that duty and further, there was no proximate cause. The CTA points out that there were "no fewer than five warning signs on the east side of Kedzie" at the time of the incident. The CTA maintains that "[l]egally, those signs were adequate, but that their adequacy is irrelevant because plaintiff's decedent's alcohol level rendered him incapable of reading or understanding any sign."

Initially, we note that the CTA is not relieved of its duty because of the decedent's diminished capacity. Notwithstanding the decedent's condition or level of mental functioning at the time he sustained injury, the CTA owed a duty to adequately warn of the dangers of the third rail. The decedent's intoxication was properly a consideration only with respect to his contributory negligence.

Questions concerning breach of a duty and proximate cause are factual matters for the jury to decide. (*Ward v. K mart Corp.* (1990), 136 Ill. 2d 132, 156; *French v. City of Springfield* (1976), 65 Ill. 2d 74, 79; *Ney v. Yellow Cab Co.* (1954), 2 Ill. 2d 74, 84.) A jury's determination will not be set aside unless, clearly, it is not supported by the evidence.

The jury returned a general verdict in which it found, *inter alia*, that the CTA "failed to adequately warn of electricity in its third rail." Of the five warning signs posted at the crossing, not one warning indicated the presence of the third rail. Additionally, as we have previously stated, the third rail was not marked, nor was there any indication that the electric current, of which the posted signs warned, was carried in any of the grade-level rails. Regardless of the CTA's belief that the signs were legally adequate, the jury apparently believed otherwise.

The CTA makes much of the fact that, in addition to the posted warning signs, it had installed "jaws" adjacent to the sidewalk, which would alert someone attempting to traverse the "jaws" that he was in a prohibited area. Though the "jaws" may, in fact, serve that purpose, they nevertheless did not warn of the third rail's existence or dangerousness. The evidence adequately supports the jury's finding that the CTA breached its duty to adequately warn of electricity in its third rail.

The term "proximate cause" describes two distinct requirements: cause in fact and legal cause, which is a policy decision that limits how far a defendant's legal responsibility should be extended for conduct that, in fact, caused the harm. (*McCoy v. McCoy* (1992), 227 Ill. App. 3d 244, 248; see also M. Polelle & B. Ottley, Illinois Tort Law 413-18 (1985).) The CTA summarily concludes, without reference to either of the two requirements, that proximate cause was not proved. We deem it appropriate to consider both requirements.

Cause in fact can only be established when there is a reasonable certainty that a defendant's acts caused the injury or damage. Under the substantial factor test, the defendant's conduct is a factual cause of the plaintiff's injury if the conduct was a material element and a substantial factor in bringing about the injury. (*McCoy*, 227 Ill. App. 3d at 248; W. Keeton, Prosser & Keeton on Torts § 41, at 267 (5th ed. 1984.) Where reasonable minds could differ, whether the defendant's conduct was of such a substantial factor in bringing about the plaintiff's injury is for the jury to decide. (W. Keeton, Prosser & Keeton on Torts § 41, at 267 (5th ed. 1984).) It is axiomatic that liability cannot be premised merely upon surmise or conjecture as to the cause of the injury.

Here, the CTA failed to adequately warn that its third rail transmitted 600 volts of electric current. In addition to that fact, plaintiff's decedent was intoxicated to a degree which placed him at the "stupor" level of intoxication. Yet we cannot conclude that plaintiff's decedent's injuries would have occurred without the CTA's failure to adequately warn of the electric current in the rail. Significantly, plaintiff's decedent apparently had the presence of mind to seek the privacy and shelter of the surrounding buildings at the crossing before relieving himself. We do not find the jury's finding on cause in fact so palpably erroneous as to warrant a different result.

Legal cause "is essentially a question of foreseeability: a negligent act is a proximate cause of an injury if the injury is of a type which a reasonable man would see as a likely result of his conduct." (See *Masotti v. Console* (1990), 195 Ill. App. 3d 838, 845.) Thus, an injury will be found not to be within the scope of the defendant's duty if it appears "highly extraordinary" that the breach of the duty should have caused the particular injury. Restatement (Second) of Torts § 435(2), at 449 (1965).

The mere fact that the CTA placed several warning signs at the crossing supports a finding that it was foreseeable that serious injury or death would result from a failure to warn of the danger. Thus, it was likewise foreseeable that injury would result if the warnings were inadequate. Accordingly, we find no error in the jury's finding of legal causation.

In sum, given the close proximity of the grade-level third rail to the pedestrian sidewalk, the failure of the CTA to warn of the presence, location and danger of the third rail, along with the fact that plaintiff's decedent would not likely discover the danger, the CTA owed plaintiff's decedent a duty to adequately warn of the danger.

The CTA breached its duty by failing to warn of the presence and location of the third rail, and that the electric current warned of was transmitted via that rail. Finally, the CTA's failure to adequately warn of the electric current in the third rail was a proximate cause of plaintiff's decedent's injuries. Thus, the jury instruction, though premised on the theory that the CTA was engaged in an activity, correctly instructed the jury that the CTA owed plaintiff's decedent a reasonable duty of care.

Alleged Trial Errors

The CTA challenges the jury's verdict in several other respects. As its major contention, the CTA argues that improper and insufficient evidence and prejudicial error compelled the entry of judgment notwithstanding the verdict or the granting of a new trial.

Under the standard announced in *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 510, a directed verdict or judgment notwithstanding the verdict should be granted only where all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict base on that evidence could ever stand. For the reasons which follow, we find that the *Pedrick* standard has not been met.

The CTA posits three arguments in support of its claim of improper and insufficient evidence. The CTA first argues that the trial court improperly permitted plaintiff to present evidence of prior incidents to establish that the third rail was unreasonably dangerous. The CTA maintains that notwithstanding plaintiff's attorney's protestations to the contrary, evidence of prior third rail incidents was used at trial as evidence that the condition of the third rail

was unreasonably dangerous. The CTA asserts that such evidence was admissible for that purpose only upon a showing of substantial similarity. Because plaintiff did not lay a foundation showing that the prior incidents were substantially similar, it was error for this evidence to be presented to prove that the rail was unreasonably dangerous.

The CTA's claimed error is not supported by the record. Although it may have been plaintiff's hope that the evidence of prior incidents would be considered by the jury for the purpose of showing the dangerousness of the rail, the record reveals that the trial court did not permit its use for that purpose. During the course of trial, defense counsel tendered to the court a limiting instruction regarding the use of the evidence of the prior incidents. The court subsequently instructed the jury that the evidence of reports received by the CTA involving individuals coming into contact with the third rail at grade crossings was for the limited purpose of showing notice to the CTA that the accidents occurred and that the evidence was not to be considered for any other purpose.

Further, in closing argument, defense counsel argued to the jury that the trial court would read a limiting instruction to it to consider the evidence of prior incidents on the issue of notice. Finally, the trial court instructed the jury that whatever evidence was received for a limited purpose should not be considered for any other purpose.

Our determination that the evidence of the prior incidents was not admitted to show that the third rail was unreasonably dangerous obviates the need for us to consider the CTA's substantial-similarity argument.

The CTA's second challenge to the jury verdict is that the trial court erred in denying the CTA's motions *in*

limine to bar testimony of plaintiff's expert. The CTA maintains that plaintiff relied upon Heilman's testimony to establish that the Ravenswood crossing was unreasonably dangerous. According to the CTA, Heilman's testimony did not establish that the crossing was unreasonably dangerous because Heilman had no degree in engineering; had "no experience in the day-to-day operations of a major metropolitan transit system"; reached his opinions based upon information supplied to him by plaintiff's attorney; and was unable to testify how the CTA could implement his suggestion to install cover boards.

An expert witness is "a person who, because of education, training or experience, possesses knowledge of a specialized nature beyond that of the average person on a factual matter material to a claim or defense in pending litigation." (134 Ill. 2d R. 220(a)(1).) If an expert possesses specialized knowledge that will assist the trier of fact, he may testify concerning that knowledge. See M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 702, at 493 (5th ed. 1990).

The proponent of the testimony bears the burden of establishing the qualifications of a person to testify as an expert witness on a particular subject. (*People v. Park* (1978), 72 Ill. 2d 203, 209.) Formal academic training or specific degrees are not required to qualify a person as an expert; practical experience in a field may serve just as well to qualify him. (*Schaffner v. Chicago & North Western Transportation Co.* (1989), 129 Ill. 2d 1, 37.) Whether a witness is qualified to testify as an expert rests within the sound discretion of the trial court. *Schaffner*, 129 Ill. 2d at 36; *Hardware State Bank v. Cotner* (1973), 55 Ill. 2d 240, 250.

Charles Heilman, who was called as plaintiff's safety expert, testified that he is a safety engineer and safety consultant. He attended Northeastern University in Massachusetts where he studied pre-engineering for a period of two years. He is a member of the American Society of Safety Engineers, and is a certified safety professional by the Board of Certified Safety Professionals and a registered professional engineer in the State of California. In the past, he has provided consulting services to utility companies concerning transmission and distribution lines and the protection of their employees and the general public from the hazards of those lines.

Heilman further testified that he has performed safety analyses of conditions on several railroads, including rapid transit systems. He is familiar with customs, practices and standards in rapid transit systems and third rails.

Heilman testified regarding the safety of the Ravenswood grade crossing third rail. In view of his knowledge, experience and skill in the area of safety and the transmission of electric power, we find no abuse of discretion in the trial court's decision to permit him to testify as an expert on the unsafe condition of the grade crossing third rail.

Further, the CTA's assertions, *viz.*, Heilman based his opinions upon information supplied by plaintiff's attorney, and Heilman was unable to testify how the CTA could implement the suggestion to install a cover board, do not defeat Heilman's competency to testify in the area of safety. Moreover, we know of no rule which dictates the source of information upon which an expert must base his opinion. It would seem to us that the more relevant inquiry is the reliability of the information upon which the expert relies.

Third, the CTA argues that plaintiff failed to establish that a catenary or gates were preferable to trespass barriers or that the installation of cover boards or additional warnings would have prevented plaintiff's decedent's death. The CTA maintains that the jury's finding that the CTA breached its duty of care by choosing to install trespass barriers instead of a catenary, gates or cover boards or that the lack of either or additional warnings caused plaintiff's decedent's death was unsupported by competent evidence and against the manifest weight of the evidence.

The elements necessary of proof in a negligence action are duty, breach, injury and causation. (*Merlo v. Public Service Co.* (1942), 381 Ill. 300, 312.) By its contention, the CTA seeks to increase the burden of proof requirements beyond those of an ordinary negligence case. A plaintiff, in order to prevail on a claim of negligence, is not required to prove, in addition to the elements of ordinary negligence, what conduct would have prevented injury.

In further support of its claim of incompetent evidence, the CTA again refers to Heilman's testimony. As we have already determined that Heilman was competent to testify on the issue of safety, we decline further discussion on this issue. Further, our earlier discussion on the issues of duty, breach and proximate cause adequately disposes of the CTA's assertion that the verdict is against the manifest weight of the evidence. Additional discussion would only be superfluous.

In support of its claim of prejudicial error, the CTA urges three additional arguments. First, the CTA argues that the trial court erred in permitting plaintiff's use of prior incidents to establish notice after the CTA offered to stipulate. The CTA maintains that once it offered to

stipulate, notice was no longer an issue in the case. Further, the CTA urges that the evidence of prior incidents was cumulative and tended to confuse the jury. Thus, the CTA argues that it was error for the trial court to permit evidence on the issue of notice.

As a preliminary matter, we note that the admission of evidence, even cumulative evidence, is largely a matter committed to the sound discretion of the trial court. (*Lewis v. Cotton Belt Route—St. Louis Southwestern Ry. Co.* (1991), 217 Ill. App. 3d 94, 108; *Simmons v. City of Chicago* (1983), 118 Ill. App. 3d 676, 685; *Long v. Bennett* (1977), 55 Ill. App. 3d 50, 53.) The court's determination on admissibility is based upon a balance of the probative value and the prejudicial effect of the proffered evidence. Absent a clear showing that the trial court has abused its discretion in admitting certain evidence, its determination will remain undisturbed. *Skelton v. Chicago Transit Authority* (1991), 214 Ill. App. 3d 554, 577; *Hopkinson v. Chicago Transit Authority* (1991), 211 Ill. App. 3d 825, 844.

A stipulation, or a judicial admission, is an agreement between the parties or their attorneys with respect to business before the court. (*American Pharmaseal v. TEC Systems* (1987), 162 Ill. App. 3d 351, 355; *Scott v. Dreis & Krump Manufacturing Co.* (1975), 26 Ill. App. 3d 971, 989; 34 Ill. L. & Prac. *Stipulations* § 1, at 166 (1958).) It has the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of that fact. (See 34 Ill. L. & Prac. *Stipulations* § 8, at 178-79 (1958); McCormick, Evidence § 254, at 142 (4th ed. 1992).) There is, however, no absolute rule on the subject.

The fact that an opponent has offered to stipulate or is not disputing a proposition for which evidence is being

offered must, of course, be a consideration in the trial court's evaluation of the probative value of the proffered evidence. However, the fact that the proposition is not being disputed is not determinative. The proponent of the evidence is entitled to have the court also consider the fair and legitimate weight that introduction of the evidence would have upon the trier of fact. (See M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 403.1, at 170 (5th ed. 1990).) After all, "a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate moral force of his evidence . . ." (Emphasis omitted.) (9 J. Wigmore, Evidence § 2591, at 824 (Chadbourn rev. ed. 1981).) A wealth of criminal law decisions demonstrate that an offer to stipulate to certain facts does not foreclose the presentation of such evidence. See, *e.g.*, *People v. Henderson* (1990), 142 Ill. 2d 258, 319; *People v. Hudson* (1970), 46 Ill. 2d 177, 196-97; *People v. Scheck* (1934), 356 Ill. 56, 60-62; see also *Veer v. Hagemann* (1929), 334 Ill. 23, 27 (stating it is competent for witnesses to testify as to mental condition of testator, and fact that his sanity is conceded as to certain date does not bar testimony of witnesses on that matter).

Having determined that the CTA's offer to stipulate did not bar presentation of the evidence, we must yet determine whether its admission was an abuse of discretion. Plaintiff presented evidence of notice in the form of testimony from David Silverzweig, an attorney who represented a plaintiff in an earlier negligence suit involving the CTA (*Mullen v. Chicago Transit Authority* (1961), 33 Ill. App. 2d 103). Silverzweig's testimony was very limited. He testified that in 1948 he represented a plaintiff who sustained an injury when he came into contact with the third rail of a CTA track and that the CTA had notice of those facts.

Following Silverzweig's testimony, plaintiff read into evidence the CTA's answers to two sets of interrogatories from two earlier cases in which the CTA was a party. In the answers, the CTA acknowledged injuries to persons coming into contact with a third rail at grade level. The first set of interrogatories acknowledged six incidents which had occurred between August 1968 and May 1973. The second set of interrogatories acknowledged four additional incidents which had occurred between July 1974 and June 1975.

Additionally, plaintiff read to the jury an allegation from the complaint in this case which stated that prior to October 1977, the CTA knew, or in the exercise of reasonable care should have known, that numerous persons had suffered injuries as a result of coming into contact with the third rail; particularly knew of the incidents set forth in the answers to interrogatories from the prior cases; and that the CTA admitted knowledge of the incidents set out in the answers.

Finally, plaintiff presented testimony from Thomas Boyle, the head of the safety department for the CTA, concerning the date and place and nature of each incident from 1968 to 1973. Boyle, additionally, affirmed that there had been three additional incidents in 1974.

In responding to the CTA's objection to Boyle's testimony, the trial court stated that plaintiff had a right to have the testimony concerning the incidents "go in" by the person at the CTA who was responsible for safety. The court stated that it allowed the testimony, even though cumulative, because Boyle was the head of safety.

We agree that the evidence was cumulative. The trial court, however, made a reasoned decision to admit the notice evidence in these various forms. Significantly, the

evidence was presented in such a manner as to give no more than the date, place and nature of the injury. Thus, the jury could not have been confused. We note that all effective evidence is prejudicial in the sense that it damages the party against whom it is offered. However, we are not persuaded that the evidence of prior incidents was unfairly prejudicial to the CTA. Therefore, we conclude that the trial court did not abuse its discretion in allowing its admission.

Finally, we note that the CTA's reliance on *Bullard v. Barnes* (1984), 102 Ill. 2d 505, is misplaced. In *Bullard*, the plaintiff suffered fatal injuries as a result of being involved in an accident. The defendant admitted liability. Thus, the only issue for the jury was damages. That notwithstanding, the plaintiff presented detailed evidence concerning the cause of the plaintiff's injuries and the defendant's conduct following the accident. (See *Bullard v. Barnes* (1983), 112 Ill. App. 3d 384, 392-93.) The appellate court held that this evidence was prejudicial and inflammatory, and required that the judgment be reversed. (*Bullard*, 112 Ill. App. 3d at 393-94.) This court affirmed. *Bullard*, 102 Ill. 2d 505.

Here, unlike in *Bullard*, the CTA denies liability. Thus, notwithstanding the CTA's admission, plaintiff was entitled to prove every element of her claim, and the evidence, which was probative on the issue of notice, was properly admitted. We do not find that the prior-incidents evidence, which was lacking in specifics, was either inflammatory or unduly prejudicial.

The CTA's second argument on the issue of prejudice is that the trial court erred in denying the CTA's motion for a mistrial following plaintiff's three emotional outbursts. We disagree.

The CTA describes that during a third emotional outburst, plaintiff sobbed uncontrollably and the court declared a recess and excused the jury. Plaintiff admits to only one emotional outburst during trial, allegedly occurring when she was in the courtroom and the jurors were in the jury room behind closed doors.

We are unable to determine from the record the extent of plaintiff's dramatic conduct. However, the record does reveal that during the course of plaintiff's testimony, the court recessed and excused the jury on three separate occasions. After the third recess, the trial court, concerned about jury sympathy, stated that the witness "had difficulty in responding to a question." During the third recess, plaintiff's counsel stated that he had spoken with plaintiff concerning the need for her to maintain her composure. There were no further incidents.

As far back as the decision in *Chicago & Erie R.R. Co. v. Meech* (1896), 163 Ill. 305, 317-18, this court held that unless the "dramatic occurrence" is intentional or is the result of an improper motive, "[t]he fact that a plaintiff . . . suddenly swoons or faints, or gives vent to hysterical exclamations, or breaks down with hysteria, does not call for the granting of a new trial."

Here, the trial court was keenly aware of the potential effect of plaintiff's conduct on the jury. After the third dramatic occurrence, the trial court noted that the jury's decision was to be made without sympathy or prejudice. In denying the CTA's motion for a mistrial, the trial court stated that it did not find plaintiff's conduct to have been so prejudicial as to require the granting of a new trial.

We do not believe, and the CTA makes no assertion, that plaintiff's conduct was either intentional or the result or any improper motivation. Significantly, during the re-

cess which followed the third incident, plaintiff's counsel advised the court that he had admonished plaintiff concerning the importance of remaining composed and no subsequent incidents occurred.

The trial court was in the best position to assess the plaintiff's conduct and to determine its effect upon the jury. We, therefore, defer to its findings. It does not appear to us that the trial court was clearly wrong in finding no prejudice. Accordingly, we find no abuse of discretion in the denial of the CTA's motion for mistrial.

We note that *Stephans v. Chicago Transit Authority* (1960), 28 Ill. App. 2d 229, a case upon which the CTA relies, is factually distinguishable. In *Stephans*, the trial court's grant of a new trial was not the result solely of plaintiff's and his wife's outbursts, but rather resulted from a combination of errors, including unsatisfactory testimony on the plaintiff's injuries. *Cf. Meech*, 163 Ill. 305 (no new trial where "during examination of the witness Ella Louise Hoyt the plaintiff became hysterical, broke out crying and uttered a cry of distress, and was carried out of the court room; that immediately at the time of the occurrence his wife exclaimed, 'You're killing my husband,' and that the witness began to cry and was temporarily excused from the stand"); see also *Mondelli v. Checker Taxi Co.* (1990), 197 Ill. App. 3d 258 (fact that plaintiffs wept twice during their counsel's opening statement and once at trial did not entitle defendants to new trial where weeping was brief, and after second occurrence, plaintiff's counsel offered to and did remove clients from courtroom during remainder of opening statement).

Third, the CTA argues that the trial court abused its discretion in permitting plaintiff to amend her complaint to change her theory of the case immediately before clos-

ing argument. The CTA urges that it was "genuinely surprised by the new theory" and was prejudiced by the amendment.

Here, prior to closing argument, plaintiff moved the court to amend her complaint. The trial court permitted the amendment over the CTA's objection. The amendment alleged that the CTA used and transmitted electricity without safeguards.

In Illinois, courts are encouraged to freely and liberally allow the amendment of pleadings. (See *Bank of Northern Illinois v. Nugent* (1991), 223 Ill. App. 3d 1, 13; *Senese v. Climatemp, Inc.* (1991), 222 Ill. App. 3d 302, 320.) Notwithstanding that liberal policy, a party's right to amend is not absolute and unlimited. (*Whildin v. Kovacs* (1980), 82 Ill. App. 3d 1015, 1017.) The decision whether to grant leave to amend a pleading rests within the sound discretion of the trial court. (*Old Salem Chautauqua Association v. Illinois District Council of the Assembly of God* (1958), 13 Ill. 2d 258, 266.) Absent an abuse of that discretion, its decision will not be disturbed on review. (See *McCastle v. Sheinkop* (1987), 121 Ill. 2d 188, 194.) Among the factors to be considered in determining whether or not to permit an amendment to the pleadings are whether the amendment would cure a defect in the pleadings; whether the other party would be prejudiced or surprised by the proposed amendment; timeliness of the proposed amendment; and whether there were previous opportunities to amend the pleadings. *Loyola Academy v. S & S Roof Maintenance* (1992), 146 Ill. 2d 263, 273, citing *Kupianen v. Graham* (1982), 107 Ill. App. 3d 373, 377.

Prior to considering the factors which we have set out above, we note our disagreement with the CTA's assertion that the amendment changed the theory of the case.

There is no allegation that plaintiff's amendment was for the purpose of curing a defect in the original pleading. Thus, this factor is not relevant to our analysis. Additionally, because amendments may be allowed at any time before the entry of a final judgment (Ill. Rev. Stat. 1991, ch. 110, par. 2-615(a)), the timeliness of plaintiff's amendment is not at issue.

Concerning the prejudice factor, we note the following. Throughout the course of trial, evidence was presented that the third rail carried 600 volts of electricity. Also, George Millonas, the director of plant maintenance for the CTA, testified in his evidence deposition that the CTA controlled the electrical force by dispersing it through the third rail and that the CTA could turn the electricity on or off. Ronald Swindell, director of power signals and communications for the CTA, testified that his job was to see that power is transmitted to the rapid transit system in a safe manner and to make certain that electrical current was capable of being delivered. Additionally, Thomas Wolgemuth, another CTA employee, testified that the CTA purchased its power from Commonwealth Edison and transformed it to 600 volts DC in its substations. Also, plaintiff presented evidence on the issue of the adequacy of warnings as well as the absence of certain types of barriers at the grade level crossing. The CTA, in rebuttal, presented evidence to prove the adequacy of the warning and barriers at the crossing.

Ordinarily, once a trial has begun, an amendment should not be permitted to set up matters of which the pleader had full knowledge at the time of interposing the original pleading and no excuse is presented for not putting its substance in the original pleading. (*Blazina v. Blazina* (1976), 42 Ill. App. 3d 159, 165.) This is particularly true where the amendment is prejudicial or would alter the

nature and quality of the proof required to defend. (*Blazina*, 42 Ill. App. 3d at 165.) However, where prejudice is not likely to result, the trial court may permit amendment.

The CTA does not suggest, and we do not find, that plaintiff's amended complaint required the CTA to present evidence other than that which it had already presented in order to defend against the added allegation. Because plaintiff's amendment did not altar the nature and quality of the proof required for the CTA to defend, we fail to see how the CTA was thereby prejudiced. In fact, it appears that the amendment did no more than conform the pleadings to the evidence adduced at trial.

Finally, we believe that plaintiff had other opportunities, prior to the close of the CTA's ease to amend the pleadings. Evidence concerning the distribution of electricity had been adduced by plaintiff in her case in chief. That notwithstanding, because the CTA was not prejudiced by the amendment, we are unable to conclude, based upon this factor alone, that the trial court abused its discretion in permitting the amendment.

In sum, we find that the jury verdict is properly and adequately supported by competent evidence. Accordingly, we find no error in the trial court's denial of the CTA's motion for directed verdict or for judgment notwithstanding the verdict.

Damages Award

Finally, the CTA contends that the jury's apportionment of fault and award of damages were the product of prejudice and unsupported by the evidence. The CTA maintains that the combination of plaintiff's emotional out-

bursts, the use of the prior-incidents evidence, and plaintiff's "carefully crafted" reasonable anticipation stipulation led to the jury's 50-50 apportionment of liability and its $3 million verdict. The CTA argues that the verdict was excessive and compels a new trial, or, at the very least, remittitur.

As we have stated, the jury awarded damages in the amount of $3 million. The award to plaintiff was reduced by 50% for decedent's own negligence.

The amount of a damage award is peculiarly an issue of fact for the jury to determine. (*Lau v. West Towns Bus Co.* (1959), 16 Ill. 2d 442, 452.) A jury's award in a wrongful death action should not be overturned unless it is obviously outside the limits of fair and reasonable compensation (see *Drews v. Gobel Freight Lines, Inc.* (1991), 144 Ill. 2d 84, 97) or unless it is obviously the result of passion or prejudice (*Phelps v. Chicago Transit Authority* (1991), 224 Ill. App. 3d 229, 234; *Shaheed v. Chicago Transit Authority* (1985), 137 Ill. App. 3d 352, 359). Further, a jury's award will not subject to remittitur where it falls within the flexible range of conclusions which can reasonably be supported by the facts. (*Chambers v. Rush-Presbyterian-St. Luke's Medical Center* (1987), 155 Ill. App. 3d 458, 468; *Guerrero v. City of Chicago* (1983), 117 Ill. App. 3d 348, 352.) Where the jury is properly instructed and has a reasonable basis for its award, a reviewing court will not disturb its verdict.

The CTA makes no assertion that the jury was improperly instructed on the issue of damages, and our review reveals no impropriety. Further, we have determined that the admission of the prior-incidents evidence was proper and that plaintiff's dramatic conduct was not prejudicial. Thus, we reject the CTA's assertion that these factors resulted in an excessive verdict.

The jury heard evidence that the remaining life expectancy of a man decedent's age (46) was 27.9 years. Calib Peterson, decedent's employer, testified that at the time of death, decedent's gross salary was $144 weekly, plus fringe benefits, valued at $100 monthly. Peterson further testified that the age of retirement was 70 years and that decedent would receive an annual 10% increase in earnings each year. Further, Peterson testified that at the time of trial, the fringe benefits were valued at $350 per month.

In closing argument, plaintiff argued that the amount of lost wages and benefits for a period from 1976 up until the time of trial (1987) amounted to about $407,000. Plaintiff represented to the court that this figure did not include an inflation factor, no 10% salary increases were computed beyond 1987, and the fringe benefit estimate was calculated on the lower figure of $100, as opposed to the higher $350 rate about which Peterson testified.

Accepting plaintiff's calculations on lost wages alone, we do not find that the jury award in this case was excessive. It is presumed that the wrongful death of a decedent results in substantial pecuniary loss to lineal heirs. *Long v. Bennett* (1977), 55 Ill. App. 3d 50, 52.) In arriving at a fair and reasonable award, the jury could properly have considered the lost wages and benefits along with the loss of society and companionship to decedent's wife and two sons. Moreover, even if we were to consider a different verdict than the jury, we would not be free to reweigh the evidence. (*Allendorf v. Elgin, Joliet & Eastern R.R. Co.* (1956), 8 Ill. 2d 164, 171.) The CTA has failed to demonstrate any impropriety in jury's award of damages.

Finally, we note that CTA's reliance on *Panepinto v. Morrison Hotel, Inc.* (1966), 71 Ill. App. 2d 319, is unavailing. In *Panepinto*, the reviewing court was called upon

to determine the propriety of the trial court's grant of a new trial. On appeal, the court stated that when "the verdict could well have been influenced by incompetent evidence erroneously admitted, or by erroneous instructions; or is clearly unwarranted by the competent damages evidence; or indicates passion or prejudice; reasonable discretion imposes a duty upon the trial judge to grant a new trial." (*Panepinto*, 71 Ill. App. 2d at 336.) The improprieties which occurred in *Panepinto* simply are not present in this case.

CONCLUSION

For the foregoing reasons, the judgment of the appellate court is reversed and the judgment of the circuit court is affirmed.

Appellate court reversed;
circuit court affirmed

JUSTICE BILANDIC took no part in the consideration or decision of this case.

JUSTICE MORAN, dissenting:

The issue is whether the CTA owed a duty of ordinary care to the decedent Lee, who was a trespasser on its right-of-way. The majority adopts section 337 of the Restatement to impose that duty on the CTA. Because the knowledge requirement of section 337 has not been satisfied under the facts of this case, I respectfully dissent from the majority's decision.

The rule in Illinois has long been that a landowner owes a trespasser only the duty to refrain from willfully or wan-

tonly injuring him. (*Marcovitz v. Hergenrether* (1922), 302 Ill. 162, 167.) A limited number of exceptions to the rule have been recognized over the years. Thus, if trespassers are discovered in a place of danger (*Briney v. Illinois Central R.R. Co.* (1948), 401 Ill. 181, 186) or if the landowner knows that trespassers have frequently intruded in a limited area (*Bernier v. Illinois Central R.R. Co.* (1921), 296 Ill. 464, 471), the landowner must exercise due care towards them. Similarly, if small children foreseeably intrude on the landowner's property and are unable to appreciate the risk involved, the landowner must take due care to protect them from being injured due to a dangerous condition on the premises. *Kahn v. James Burton Co.* (1955), 5 Ill. 2d 614, 625.

With today's decision, the majority has carved out yet another exception to the trespasser rule. In this case, the majority purports to follow section 337 of the Restatement, entitled "Artificial Conditions Highly Dangerous to Known Trespassers." Section 337 provides:

> "A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failing to exercise reasonable care to warn them of the condition if
>
> (a) *the possessor knows or has reason to know of their presence in dangerous proximity to the condition*, and
>
> (b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved." (Emphasis added.) Restatement (Second) or Torts § 337, at 195 (1965).

The majority recognizes that, in order to establish a duty of ordinary care under section 337, the trespasser must first show that the landowner knew or had reason

to know of the trespasser's presence. Comment *a* to section 337 states that the rule "relates only to the conditions under which a possessor of land is subject to liability to a trespasser whom he *knows to be about to come in contact* with a highly dangerous artificial condition maintained by him upon the land." (Emphasis added.) (Restatement (Second) of Torts § 337, Comment *a*, at 195 (1965).) Thus, section 337, as explained by comment *a*, requires foreseeability in fact. If section 337 were correctly applied to the facts of this case, the CTA would clearly not be liable. The majority, however, refuses to accept comment *a*'s limitation of section 337 to instances where the landowner knows that the trespasser is about to come into contact with a dangerous condition on his premises. In this, it relies upon the reasoning of the only jurisdiction which has previously adopted section 337 without accepting the interpretation of comment *a*. (See *Webster v. Culbertson* (1988), 158 Ariz. 159, 761 P.2d 1063.) In my opinion, the Arizona case is inapplicable to the facts of the case at bar.

In *Webster*, the defendant had erected a barbed wire fence to keep trespassers from entering her property. The fence crossed over a wash in which footprints, tire tracks and hoofprints were plainly visible. The wash was visible from defendant's house, and she visited the area approximately once a week. Evidence indicated that, at the time of the accident, the wash was used by pedestrians, children, motorcyclists, four-wheel drive vehicles, dunebuggies and equestrians for recreational purposes. Defendant's fence was virtually invisible, and she had posted no signs to alert trespassers to its existence. The plaintiff was injured when he rode his horse into the fence. Adopting section 337, the Arizona Supreme Court rejected defendant's argument that she had no knowledge of reason to

know of the plaintiff's presence, and reversed the trial court's grant of summary judgment in her favor. The majority states that the Arizona court thus imposed a duty to warn on a person who maintains a dangerous artificial condition when the person is aware of the "possibility" that others will come into dangerous proximity of the condition. (Slip op. at 9.) However, the *Webster* court instead stated that section 337 is applicable when the defendant has "reason to know" of the presence of trespassers. *Webster*, 158 Ariz. at 163, 761 P.2d at 1067.

Moreover, the facts of the present case are markedly different from those in *Webster*, where there was ample recent evidence of the presence of many trespassers. Here, the CTA stipulated that it had notice of 10 prior accidents in the 3.2-mile right-of-way where its third rail runs at grade level. Thus, it could reasonably *anticipate* the intrusion of trespassers. However, the CTA had no actual *knowledge or reason to know* that trespassers had recently been within its right-of-way at the Kedzie/Ravenswood crossing. Not only had there been no accidents along the entire 3.2-mile stretch of street-level third rail within the previous 15 months, but, more to the point, there was no physical evidence that intruders had recently entered the particular area where the accident occurred in 1977. Although a youth had fallen onto the third rail from a fence he was scaling at that location in 1974, there was no recorded incident of a pedestrian ever previously contacting the third rail after leaving the sidewalk at the Kedzie/Ravenswood crossing. I do not believe that the CTA's knowledge of accidents taking place more than 15 months earlier and at other locations along the line is enough to satisfy comment *a's* requirement that a landowner have reason to know that a trespasser is *about to come into contact* with the third rail. Further, even if comment *a* were not to apply, the facts of this case fail

to satisfy section 337's requirement that the CTA knew or had reason to know of the presence of trespassers at the Kedzie/Ravenswood crossing.

In a conclusory manner, the majority points to policy reasons-the likelihood of injury, the magnitude of guarding against the injury, and the consequences of placing that burden on the defendant-for its imposition of a duty of ordinary care on the CTA. However, the majority does not weigh the cost to the CTA-and the public-of putting into place and maintaining other safeguards. The CTA contends that measures such as swinging gates and catenary wires would impose a heavy financial burden, and that such measures have not proved effective in protecting the public. Consequently, the CTA placed signs warning "Danger," "Keep Out" and "Electric Current" within several feet of the third rail at the Kedzie/Ravenswood crossing. It also installed pointed boards on the ground to alert trespassers to the fact that they were walking where they ought not to be. That the CTA might have taken more extensive precautions to warn the public of danger goes to the question of whether it breached its duty of ordinary care, not to whether it had such a duty in the first place. See, *e.g.*, *Deibert v. Bauer Brothers Construction Co.* (1990), 141 Ill.2d 430, 441.

Because the presence of trespassers at the Kedzie/Ravenswood crossing was not foreseeable in fact, I do not believe that the CTA had a duty of ordinary care towards trespassers at that location. The jury found that the CTA's conduct was not willful and wanton. Consequently, in my view the CTA was not liable for the injury to Lee. I believe that the majority's decision to the contrary will go far towards making the CTA and any other landowner who can possibly anticipate the presence of trespassers in a dangerous area an absolute insurer of public safety.

JUSTICE HEIPLE, also dissenting:

This case demonstrates once again the casino-like atmosphere of our tort system. A drunken 46-year-old Korean immigrant whose blood alcohol was 0.341, or three times the legal limit for intoxication under the motor vehicle code, walked off the sidewalk and up the Chicago Transit Authority railroad tracks where he was electrocuted by the so-called third rail which supplies power to the electric trains. At his point of entry, the decedent walked past three warning signs, "DANGER," "KEEP OUT" and "ELECTRIC CURRENT." These signs were printed in English which the decedent could not read. With a 0.341 concentration of blood alcohol, however, it is questionable whether it would have mattered if the signs had been printed in Korean or even in pictures. The decedent was virtually blind drunk.

In addition to the signing, sharp triangular shaped boards had been installed between the sidewalk and the third rail to make it extremely difficult and awkward for a person to walk up the tracks. Nonetheless, the decedent walked up the tracks approximately 6-1/2 feet to the point where the third rail began. There, attempting to urinate, he was electrocuted.

At the time of his death, his yearly gross income including all fringe benefits was approximately $8,700. He had a remaining life expectancy of approximately 28 years. He left surviving a widow and two sons. The jury returned a verdict of $3 million reduced by 50% for the decedent's own negligence. The net verdict was thus $1.5 million.

As with any tort case, there are two primary elements, namely, liability and damages. As to liability, at the time of this accident, Illinois was operating under the true form of comparative negligence. That is to say, if a defendant

were at fault to any extent, the plaintiff could recover that percent of his damages. In other words, a plaintiff who was 90% negligent on his own behalf could still recover 10% of his damages from a partially culpable defendant. Due to a statutory enactment, however, since November 25, 1986, an injured plaintiff may now recover damages only so long as the percentage of his fault does not exceed 50% of the total. Ill. Rev. Stat. 1991, ch. 110, par. 2-1116.

Considering the operative facts, it is clear to this writer that the jury finding of 50% fault on the part of the Chicago Transit Authority is grossly erroneous and warrants reversal on that element alone. It is fair to say that some negligence may be attributable to the CTA since various safety devices could or might have been installed that would have made entry to the track area more difficult. A 10% degree of negligence or thereabouts would be in the range of reasonableness. A finding of a 50% degree of negligence is, as I have indicated, grossly erroneous. Such a finding could only be the result of sympathy, passion, prejudice or ignorance.

Regarding the second element, namely, damages, the jury verdict once again overshot the mark. It fixed the plaintiff's damages at $3 million reduced by 50% for its finding of decedent's own negligence. The net verdict was thus $1.5 million. The oft-quoted aphorism that figures don't lie but liars can figure is certainly true. The decedent's estate and survivors were not damaged to the extent of $3 million. It is quite a simple proposition to puff up a damage verdict to offset its reduction by the comparative negligence percentage. Thus, as in this case, a jury wanting to give a decedent $1.5 million but choosing to find him 50% at fault could very simply just double the damage figure. Whether the jury's calculations in the

instant case were the result of intellectual dishonesty and, hence, corrupt or whether they were simply the result of honest mistakes or poor judgment is a matter of conjecture only and not the controlling issue. That the jury was wrong, however, seems clear.

As to the loss to decedent's estate, simple multiplication of 28 years of life expectancy times his annual earnings would equal approximately $250,000. If one were to add another $250,000 for loss of society to his family and another $250,000 for the one-third to be paid to the attorney, the total verdict would be in the range of $750,000. Reducing this figure under pure comparative negligence by a 90% fault figure attributable to decedent, a net verdict of $750,000 is produced.

It seems apparent in this case that the bulk of the jury verdict could only be allocated to that concept we call "loss of society." This is so since it could not possibly be justified on a loss of income basis.

What is loss of society worth? In Illinois, we have chosen to give the jury carte blanche authority to fix this figure. The law falsely pretends that the concept "loss of society" has a quantifiable cash value when it clearly does not. Certainly, no one can deny the reality of the feeling of deprivation upon the loss of a loved one. Loss of society is a real loss which causes real suffering. But such a loss cannot be quantified with a dollar sign. As was observed in 1986 by the West Virginia Supreme Court, "if the measure of damages were the value of a human life then, arguably, no jury verdict could be excessive. The death of a family member *** involves inconsolable grief for which no amount of money can compensate. Counsel's suggestion that the [family] would not have traded [their child's] life for $10,000,000 is entirely accurate-but they would also not have traded [their child's] life for $100,000,000

or even $1,000,000,000." *Roberts v. Stevens Clinic Hospital, Inc.* (W. Va. 1986), 345 S.E.2d 791, 800.

By refusing to recognize any limits on such damage awards, litigants, with the assistance of their attorneys, are turning the court system into a giant gambling casino. Pain, suffering, or the loss of a loved one may produce incalculable wealth if only the person causing the injury is wealthy enough or carries enough insurance.

What we are witnessing here is a vast predatory movement of citizen against citizen, the magnitude of which is beyond calculation. All of this predation is taking place under the form of legal, political and governmental procedures. Though selected individuals are being made rich, most notably the plaintiffs' personal injury lawyers, society as a whole is crippling itself.

No corporation is large enough, no individual is rich enough, no amount of insurance coverage is high enough to prevent a defendant's financial destruction in a negligence law suit under existing standards. It is long past time for the courts to recognize that damages such as pain and suffering and loss of society do not have a quantifiable dollar value. If society is to allow compensation for such injuries, then society has a duty to limit recovery to some rule of reasonableness.

While the courts could order remittitur in an appropriate case such as the case we decide today, they have shown no willingness to do so. The only recourse for the public is through action on the part of the legislature with the setting of statutory limits. Action is needed now and is long overdue.

For the reasons given, I respectfully dissent.

**Order of the Supreme Court
Denying the Petition for Rehearing**

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

December 7, 1992

Ms. Ruth E. Van Demark
Wildman, Harrold, Allen & Dixon
225 West Wacker St., S#2500
Chicago, Illinois 60606

No. 71304—Jae Boon Lee, Admrx., etc., appellant, v. Chicago Transit Authority, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Bilandic, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 17, 1992.

In the Appellate Court of Illinois
First District, Sixth Division
No. 1-88-0088—October 5, 1990

JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased,

Plaintiff-Appellee,

v.

CHICAGO TRANSIT AUTHORITY,

Defendant-Appellant.

Opinion filed October 22, 1992. —
Rehearing denied November 20, 1992.

Appeal from the Circuit Court of Cook County
Honorable James E. Sullivan, Judge Presiding

JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff, Jae Boon Lee, administratrix of the estate of Sang Yeul Lee, brought a wrongful death action to recover damages for the death of her husband which occurred while he was on land owned by defendant, Chicago Transit Authority. Plaintiff's complaint alleged that the CTA's conduct in maintaining its third rail was either negligent or wilful and wanton, and caused decedent's death. The jury returned a verdict for plaintiff on the negligence count in the amount of $3,000,000, but reduced its award by 50 percent based on the decedent's own negligence. In response to a special interrogatory, the jury

found that the CTA's conduct was not wilful and wanton. The court entered judgment on the verdict for $1,500,000. The CTA appeals from that judgment, contending that the trial court erred in denying its motions for directed verdict and for judgment notwithstanding the verdict; that improper and insufficient evidence and trial error compel a new trial; and that the jury's apportionment of fault and award of damages are not supported by the evidence.

Both the Illinois Trial Lawyer's Association and Commonwealth Edison Company have filed briefs as *amicus curiae* in this case. The Association urges this court to affirm the trial court's decision, while Commonwealth Edison urges us to reverse the decision.

At trial, the following information was adduced. Plaintiff testified that she and the decedent immigrated to the United States from a rural area outside of Seoul, Korea. They had two sons, Chong Yoon Lee and Jae Lee. At the time of his death, the decedent was employed at Thayer & Chandler, a manufacturer of air brushes. The decedent had a limited understanding of English, but was able to get to and from work by riding the Ravenswood "L".

On October 21, 1977, the morning preceding the accident, the decedent informed plaintiff that he planned to attend a party in the evening. Decedent apparently left the party after dark. He proceeded up Kedzie Avenue, a north/south street which intersected with the northwest-bound Ravenswood rapid transit line. At this point, he apparently proceeded into the CTA's right-of-way in order to urinate. In the process of doing so, he came into contact with the third rail, and suffered fatal injuries.

The decedent's body was found on the elevated ("L") tracks located on the CTA's Ravenswood line at or near

4700 North Kedzie Avenue. John Costantini, a Chicago Fire Department paramedic field officer, testified that the decedent lay perpendicular to the northwest-bound CTA tracks, his head pointing north. The decedent's feet were near the third rail, pointing in its direction. (The third rail carries 600 volts of electricity and provides power to the train cars as they traverse grade crossings.) The decedent's pants zipper was open, and his penis was exposed. The pathology report listed the immediate cause of death as electrocution. At the time of his death, the decedent had a 0.341 percent blood alcohol concentration which placed him in the stupor classification of intoxication.

Thomas Wolgemuth, the CTA's Director of Plant Maintenance and later its Manager of Engineering, testified that the decedent was neither permitted nor invited to be on the Kedzie "L" tracks on October 22, 1977. (Plaintiff introduced no evidence that the presence of decedent inside the Kedzie right-of-way was known to the CTA.) In order to prevent pedestrians from entering the right-of-way at grade crossings such as the one at Kedzie, the CTA developed a "pedestrian access barrier system." This system was in place in July 1976, and consisted of warning signs, right-of-way fencing, access barriers and chain link fences, and trespass barriers, also known as "jaws."

Prior to installing the "jaws" trespass barrier system, the CTA considered three alternative protective systems: gates which would remain closed except when a train was traveling through the crossing, cover boards which would cover the third rail, and catenary lines which would carry the electric current overhead.

Charles Heilman, a safety expert, testified for plaintiff that each of the above systems would have been preferable to the system employed by the CTA. Heilman con-

cluded that the "jaws" were intrinsically unsafe and that the warning signs were insufficient. Heilman gave detailed reasons for his conclusion, but because of our view of the proceedings, it is not necessary to set forth his reasoning.

Plaintiff introduced evidence of ten prior accidents involving injuries caused by the third rail at CTA grade level crossings. Of those, one occurred at the Ravenswood crossing at Kedzie in 1974. The ten accidents spanned the period from 1948 through 1975. None of the accidents occurred after the CTA placed its "jaws" trespass barrier system at grade level crossings on the Ravenswood line.

Following the presentation of all testimony, the parties tendered instructions to the court. Plaintiff tendered an instruction based on her theory that the CTA was engaged in the activity of conducting electricity. The CTA objected to plaintiff's instruction and tendered its own instruction based on the position that the third rail was a condition, not an activity. The court found that the CTA was engaged in the activity of conducting electricity, and gave the jury plaintiff's instruction charging the CTA with the duty of ordinary care. The court refused to give the CTA's instruction.

Following deliberations, the jury returned a verdict in the sum of $3,000,000 which it reduced by 50% to account for the decedent's own negligence. The CTA's motion for directed verdict as well as its motion for judgment notwithstanding the verdict were denied.

The CTA first contends that the trial court erred in denying its motions for a directed verdict on the negligence count, and for judgment notwithstanding the verdict. In support of this contention, the CTA argues that railroads owe no duty of ordinary care to trespassers and that only an intentional and affirmative activity by a landowner

gives rise to a duty of ordinary care owed to trespassers whose presence can be anticipated.

Although plaintiff argues that it was not proved that decedent was a trespasser at the time of his death, we find that the evidence establishes that he was a trespasser. A trespasser is one who enters the premises of another for his own purposes without permission, invitation or other right. (*Sumner v. Hebenstreit* (1988), 167 Ill. App. 3d 881, 522 N.E.2d 343; *Trout v. Bank of Belleville* (1976), 36 Ill. App. 3d 83, 343 N.E.2d 261.) At trial, it was established that the decedent entered the CTA's right-of-way in order to urinate. The CTA presented evidence to establish that the decedent was neither invited nor permitted to be on the right-of-way on October 22, 1977. Plaintiff presented no contrary evidence. The question of status may be decided as a matter of law if there are no factual questions present. (*Lorek v. Hollenkamp* (1986), 144 Ill. App. 3d 1100, 495 N.E.2d 679.) In view of the unrebutted testimony presented by the CTA with regard to this issue, we conclude as a matter of law that at the time of his death, the decedent was a trespasser.

Generally, a railroad company owes no duty to a trespasser except to refrain from wantonly or wilfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril. (*Rowe v. Taylorville Electric Co.* (1904), 213 Ill. 318, 72 N.E. 711; *Illinois Central R.R. Co. v. Eicher* (1903), 202 Ill. 556, 67 N.E. 376; *Knyal v. Illinois Power Co.* (1988), 169 Ill. App. 3d 440, 523 N.E.2d 639; *Grimwood v. Tabor Grain Co.* (1985), 130 Ill. App. 3d 708, 474 N.E.2d 920; *Fosbury v. Aurora, Elgin & Chicago Ry. Co.* (1908), 141 Ill. App. 98.) This limited duty is based on the concept that the law does not require an owner or occupier of land to anticipate the presence of persons wrongfully or unexpectedly on his

land. (*Corcoran v. Village of Libertyville* (1978), 73 Ill. 2d 316, 383 N.E.2d 177.) There are, however, three exceptions to this general rule of limited duty. The first is for young children who the owner knows habitually frequent the vicinity of a defective structure or dangerous agency existing on the land and who by reason of their immaturity cannot appreciate the risk involved. (*Corcoran v. Village of Libertyville* (1978), 73 Ill. 2d 316, 383 N.E.2d 177; *Kahn v. James Burton Co.* (1955), 5 Ill. 2d 614, 126 N.E. 2d 836.) The second exception applies to trespassers using permissive paths. (*Morgan v. New York Central R.R. Co.* (1927), 327 Ill. 339, 158 N.E. 724.) The third exception is for discovered trespassers. *Briney v. Illinois Central R.R. Co.* (1948), 401 Ill. 181, 81 N.E.2d 866; *Illinois Central R.R. Co. v. Eicher* (1903), 202 Ill. 556, 67 N.E. 376.

It is obvious that neither the first exception, dealing with small children, nor the third exception, dealing with discovered trespassers, is applicable to the situation before us. At the time of his death, decedent was forty-six years old. Thus, the exception for children does not apply. Nor was there any testimony which would permit a finding that the decedent had been discovered by the CTA. Thus, the discovered trespasser exception does not apply.

Moreover, we find that the permissive use exception and its derivatives are not applicable. Under the permissive use exception, a landowner may owe a duty of care to trespassers, other than to refrain from wilful and wanton conduct, when the landowner permits regular use of his land for travel. (See, *e.g.*, *Morgan v. New York Central R.R. Co.* (1927), 327 Ill. 339, 158 N.E. 724 (when railroad company permitted use of its right of way over a period of years, the company had a duty to use reasonable care to discover persons passing along the path in question); *McDaniels v. Terminal R.R. Association* (1939),

302 Ill. App. 332, 23 N.E.2d 785 (when railroad company knew that a pathway over its right of way had been used by the general public for as many as twenty years, the company owed a duty to watch out for members of the public who might be using the pathway).) Here, the CTA did not acquiesce in the use of its right-of-way as a path. Rather, it posted warnings, erected right-of-way fencing, installed wooden access barriers and chain link fences, and designed and implemented "jaws" to prevent unauthorized persons from entering that right-of-way. Thus, plaintiff may not use the permissive use exception to impose a duty upon the CTA to have discovered the decedent, and to have taken reasonable precautions to protect him from harm.

Having so determined, we nonetheless must inquire further to verify that additional, less clearly defined, exceptions to the general rule of limited duty to trespassers do not apply. A review of our jurisprudence in this area reveals that the exceptions to this general rule have evolved over the years to incorporate certain aspects of what formerly was known as the active negligence doctrine. Plaintiff's theory in this regard is set forth in section 334 of the Second Restatement of Torts which provides as follows:

> "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety." Restatement (Second) of Torts § 334 (1965).

This Restatement section has been incorporated into an Illinois jury instruction specifically designed to apply in those situations in which an activity on the landowner's premises causes injury to a known or anticipated tres-

passer. (See Illinois Pattern Jury Instructions, Civil, No. 120.03, Notes on Use (2d ed. 1971) (stating that this instruction instead of IPI 120.02 is to be used when the activities of the owner or occupant, *as distinguished from the condition of the premises*, caused the injury).) The trial court here determined that this instruction obtained, and over the CTA's objection, gave it to the jury.

The CTA contends that the trial court erred in instructing the jury on the standard of care owing to a trespasser who is injured by an activity occurring on its premises. As the basis of this contention, the CTA argues that the trial court improperly determined that the decedent's death resulted from an "activity" on the CTA's right-of-way. The CTA maintains that the third rail is a condition, not an activity. The CTA concludes that the trial court's errors in this regard improperly permitted the imposition of a duty of ordinary care.

During the course of the trial, plaintiff amended her complaint four times. In her fourth amended complaint, plaintiff alleged that the CTA was negligent in that it used and transmitted electricity without proper safety measures. At the conclusion of all evidence, plaintiff moved to file an amendment to that complaint in order to conform it to the evidence as presented. The amendment contained an allegation that the CTA used and transmitted electricity without safety measures. Over objection, the court allowed the amendment noting that there was evidence that the CTA was placing its electricity in the third rail for various stations throughout the city of Chicago.

Based on the amended complaint, plaintiff tendered an instruction based on IPI No. 120.03 which sets forth the duty owed by an owner to a trespasser for an injury caused by the owner's activities. The CTA offered IPI Instruction No. 120.02 which sets forth the duty owed by an

owner to a trespasser for an injury caused by a condition of the premises. That instruction provided that the CTA was not under a duty to use ordinary care to see that its premises were reasonably safe for Sang Yeul Lee. The court ruled that the CTA was engaged in the activity of conducting electricity, and, over the CTA's objection, gave the instruction tendered by plaintiff. The court also instructed the jury that the CTA had a duty, "before and at the time of the occurrence, to use ordinary care for the safety of the decedent."

We find that the trial court improperly determined that the CTA's use of a rail charged with electricity was an "activity" giving rise to a basis for instructing the jury on the duty owed to a trespasser caused by the CTA's activities.

The Illinois Supreme Court Committee Comments to the instructions distinguish situations in which a condition of the premises gave rise to the injury and those in which the owner or occupant of the premises actively did something which injured the plaintiff. (See generally Illinois Pattern Jury Instructions, Civil, Nos. 120.02, 120.03, Notes on Use (2d ed. 1971).) Moreover, the instructions provide different prerequisites to liability and a different standard of care in each situation. (See Illinois Pattern Jury Instructions, Civil, Nos. 120.02, 120.03 (2d ed. 1971).) Our decisions in this area confirm that this distinction is appropriate. (See, *e.g.*, *Marcovitz v. Hergenrether* (1922), 302 Ill. 162, 134 N.E. 85 (elevator shaft on defendant's premises was a condition on the land); *Votava v. Material Service Corp.* (1979), 74 Ill. App. 3d 208, 392 N.E.2d 768 (submerged barge on defendant's premises was a condition on the land); *Phillips v. J.F. Martin Cartage Co.* (1976), 42 Ill. App. 3d 890, 356 N.E.2d 1237 (refuse container on defendant's premises was a condition on the land); *Shine*

v. Wabash R.R. Co. (1956), 8 Ill. App. 2d 521, 132 N.E.2d 41 (operating train on defendant's premises was an activity on the land); *McDaniels v. Terminal R.R. Association* (1939) 302, Ill. App. 332, 23 N.E.2d 785 (lumber thrown by defendant's employees on its premises was an activity on the land).) Thus, as outlined in the instructions, the situations in which courts have found that an owner's activity gave rise to a duty of reasonable care to trespassers are those in which two factors existed: a positive act of wrongdoing *and* knowledge, constructive or actual, of the trespassers' presence. (See, *e.g.*, *McDaniels v. Terminal R.R. Association* (1939), 302 Ill. App. 332, 23 N.E.2d 785. Compare *Briney v. Illinois Central R.R. Co.* (1948), 401 Ill. 181, 81 N.E.2d 866 (court refused to impose a standard of ordinary care upon the landowner when a child was struck by a train when the railroad did not know nor should it have anticipated the child's attempt to jump on a moving train).) In contrast, in situations in which courts have found that a condition of the premises caused the plaintiff's injury, no duty of ordinary care existed even when the landowner had knowledge of the likelihood of a trespasser's presence. See, *e.g.*, *Hessler v. Cole* (1972), 7 Ill. App. 3d 902, 289 N.E.2d 204; *Dent v. Great Atlantic & Pacific Tea Co.* (1955), 4 Ill. App. 2d 500, 124 N.E.2d 360.

Thus, the determination of whether an injury was caused by an activity or a condition is crucial, and we believe that a review of the relevant case law will be instructive. In the Comment to IPI No. 120.03, the authors cite *McDaniels v. Terminal R.R. Association* as an example of a situation in which the plaintiff was injured by an activity, and thus one in which that instruction would have been appropriate. There, the plaintiff, a trespasser on defendant's property, was injured when he was struck by

pieces of lumber thrown by defendant's employees. The court found that defendant had constructive knowledge of plaintiff's presence on a path which had been used by the public for as many as twenty years. In view of this knowledge, the court found that defendant had an obligation to keep a lookout for persons on its premises, and to conduct its activities in a manner which reasonably would safeguard those persons.

The court reached a similar result in *Shine v. Wabash R.R. Co.* where a child was struck and injured by defendant's train when the child wandered onto the tracks. The court noted that defendant's employees had actual knowledge of the child's presence, and concluded that in view of this knowledge, the reasonable care standard of ordinary negligence applied.

Finally, in *Votava v. Material Service Corp.*, the court found that a submerged barge which was used for storing the defendant's equipment and supplies was a condition rather than an activity. The plaintiff was injured when his boat ran into the submerged barge. Citing *McDaniels* and *Shine*, the court emphasized that in those situations in which an activity was found, there was a positive act of wrongdoing, rather than a mere condition of the land or property. The *Votava* court concluded that even though the defendant had knowledge of trespassers to the premises, it nonetheless owed such trespassers only a duty to refrain from wilful and wanton misconduct.

In light of these decisions, we find that the CTA was not conducting an affirmative activity when the decedent sustained his fatal injuries and that the trial court erred in so concluding. The use of electric energy is not akin to the operation of a train, or to the hurling of lumber, endeavors which have been labelled "activities." (*McDaniels*

v. Terminal R.R. Association (1939), 302 Ill. App. 332, 23 N.E.2d 785; *Shine v. Wabash R.R. Co.* (1956), 8 Ill. App. 2d 521, 132 N.E.2d 41.) It is not an affirmative activity, but rather, is a passive, although dangerous, condition comparable to the submerged barge in *Votava v. Material Service Corp.* Compare *Walker v. Texas Electric Service Co.* (Tx. Ct. App. 1973), 499 S.W.2d 20 (labelling electricity transmission wires a condition).

Significantly, we hold that contrary to the trial court's conclusion, the CTA is not in the business of distributing electricity despite the fact that it owns and operates transformers. Rather, the CTA is a consumer of electricity. More specifically, the CTA purchases electricity in order to charge its third rail. This purchase is not unlike a homeowner's purchase of electricity in order to charge an appliance such as an electric outdoor grill. In such an instance the consumer purchases the use of electric energy and ultimately may use that electricity to undertake an activity which may result in injury. (See, *e.g.*, *Prater v. Veach* (1962), 35 Ill. App. 2d 61, 181 N.E.2d 739 (child electrocuted when she came in contact with an air conditioning unit located on a concrete patio behind the defendant's house).) Nonetheless, a landowner does not become a utility simply because it uses or redistributes electricity. Moreover, even a utility has a duty of ordinary care to insulate its power lines only to the extent that those lines are in a place *where persons have a right to be.* (*Merlo v. Public Service Co.* (1942), 381 Ill. 300, 45 N.E.2d 665; *Rowe v. Taylorville Electric Co.* (1904), 213 Ill. 318, 72 N.E. 711; *Watkins v. Mt. Carmel Public Utility Co.* (1988), 165 Ill. App. 3d 493, 519 N.E.2d 10; *German v. Illinois Power Co.* (1983), 115 Ill. App. 3d 977, 451 N.E.2d 903.) That is, a utility, like any other owner or occupier of land, has a duty of ordinary care when engaged in an

affirmative activity and when it knows or should have known of the presence of the trespasser. As the CTA was not engaged in an affirmative activity, we find that the trial court erroneously gave the IPI instruction relating to the duty owed to a trespasser when he is injured by an activity conducted upon the landowners premises.

In view of our conclusion that the third rail is a condition rather than an activity, we further find that the trial court erroneously denied the CTA's request to instruct the jury that it was not under a duty of ordinary care to a trespasser for conditions on the premises. Illinois Pattern Jury Instructions, Civil No. 120.02 (2d ed. 1971.)

We find that IPI No. 120.02 properly sets forth the law with respect to a condition on the land (See *Hansen v. Goodyear Tire & Rubber Co.* (1990), 194 Ill. App. 3d 351, 551 N.E.2d 253; *Dent v. Great Atlantic & Pacific Tea Co.* (1955), 4 Ill. App. 2d 500, 124 N.E.2d 360), and we note that our finding with respect to this instruction applies with equal force when the landowner has notice that persons are likely to come into the area. Our courts have consistently found that insofar as a condition on the land is concerned, a landowner owes only a duty to refrain from wilful and wanton misconduct. For example, in *Hessler v. Cole* (1972), 7 Ill. App. 3d 902, 289 N.E.2d 204.) (1972), 7 Ill. App. 3d 902, 289 N.E.2d 204, the plaintiff was injured when she fell into a hole between the boards of a pier on the defendant's property. The trial court entered summary judgment in favor of the defendant, finding that even though there was evidence the pier had been frequented by trespassers over the past five years, the owner had no duty to keep the premises in any particular state or condition to promote the safety of trespassers. (*Hessler v. Cole* (1972), 7 Ill. App. 3d 902, 289 N.E.2d 204.) As noted above, a similar result obtained

in *Votava v. Material Service Corp.* See also *Dent v. Great Atlantic & Pacific Tea Co.* (1955), 4 Ill. App. 2d 500, 124 N.E.2d 360 (holding that the duty owed to a licensee who sustained injuries when he fell into a sunken driveway while travelling on a permitted path was the same as that owed a trespasser, to refrain from wilful and wanton misconduct).

Significantly, this principle was found to apply in a situation analogous to the case before us. In *Fosbury v. Aurora, Elgin & Chicago R.R. Co.* (1908), 141 Ill. App. 98, the plaintiff was injured on a third rail while trespassing on the defendant's right-of-way. At the time of the injury, the plaintiff was on a path which was used by a considerable number of people. The court nonetheless held that the plaintiff was a trespasser and that the defendant had owed him no duty except to refrain from wilfully or wantonly injuring him. The *Fosbury* case is indistinguishable from the present case. In both cases, the landowner owed the trespasser no duty except to refrain from wilfully or wantonly injuring him.

We note, however, that the failure of a landowner to disclose certain dangers to trespassers may constitute wilful and wanton misconduct. (*Hessler v. Cole* (1972), 7 Ill. App. 3d 902, 289 N.E.2d 204; *Schoen v. Harris* (1969), 108 Ill. App. 2d 186, 246 N.E.2d 849.) As noted earlier, however, the jury here found that the CTA had not engaged in wilful and wanton misconduct.

In sum, we hold that the trial court improperly gave to the jury IPI (Civil) No. 120.03, outlining the standard of care owed by a landowner to a known or anticipated trespasser when that trespasser is injured by an activity on the land. Thus, the trial court improperly instructed the jury that the CTA owed the decedent a duty of ordi-

nary care. When a case is tried under an incorrect theory of law, the appropriate action is to reverse the judgment and to remand for a new trial. (*Sparling v. Peabody Coal Co.* (1974), 59 Ill. 2d 491, 322 N.E.2d 5.) The need for a new trial here, however, is obviated because the jury was properly instructed that the CTA could be liable for wilful and wanton conduct, and specifically found that the CTA's conduct was not wilful and wanton. Thus, even with proper instructions, the result could not change and there is no need to remand for further proceedings and we therefore reverse the trial court judgment. Accordingly, we need not consider the CTA's remaining contentions regarding various alleged trial errors.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

Order of Appellate Court
Denying Petition for Rehearing

ORDER

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased, Plaintiff-Appellee,	)	No. 1-88-0088
v.	)	
CHICAGO TRANSIT AUTHORITY, Defendant-Appellant.	)	

ORDER

This cause coming on to be heard on appellee's petition for rehearing, and the court being advised in the premises;

IT IS HEREBY ORDERED that the petition for rehearing is denied.

ENTER:

Name
Attorney for
Address
City
Telephone

[stamped date Nov. 20]

s/s Daniel J. McNamara
Justice

s/s Thomas R. Rakowski
Justice

s/s Michael A. Bilandic
Justice

GILBERT S. MARCHMAN, CLERK OF THE
APPELLATE COURT, FIRST DISTRICT

No. 71304

In the
Supreme Court of Illinois

JAE BOON LEE,
Administratrix of the Estate of
SANG YEUL LEE, Deceased,
Plaintiff-Appellant,

v.

CHICAGO TRANSIT AUTHORITY,
Defendant-Appellee.

On Petition for Leave to Appeal from the Appellate Court of Illinois, First District

No. 88-88

There Heard on Appeal from the Circuit Court of Cook County, County Department, Law Division

No. 78 L 6842

The Honorable
James E. Sullivan,
Judge Presiding.

PETITION FOR REHEARING OF CHICAGO TRANSIT AUTHORITY, DEFENDANT-APPELLEE

On October 22, 1992, this Court filed a decision in which it adopted section 337 of the Restatement (Second) of Torts to reinstate a $1.5 million judgment entered against the Chicago Transit Authority. *Lee v. Chicago Transit Authority*, No. 71304, slip op. at 6 (Ill. Oct. 22, 1992), Appendix A. In adopting section 337, the Court rejected comment *a* to section 337 which requires actual knowledge or actual anticipation of a real trespasser's presence on a landowner's or occupier's property or premises, *id.* at 8, and alternatively holds or implies that the duty imposed

in section 337 is one simply of "ordinary care," *id.* at 1, 5, 9, or "ordinary care to protect and/or to warn the trespasser," *id.* at 6.

The CTA seeks rehearing in this case because, in rejecting comment *a* and suggesting (if not holding) that the duty of reasonable care ***to warn*** found in section 337 encompasses a duty of ordinary care to make the premises safe for trespassers, this Court has crafted an entirely new duty of care owed to an entirely new class of trespassers—one that has no basis in the Restatement or the common law, and one that effectively abolishes any remaining distinction between invitees/licensees and trespassers in Illinois. In so doing, the Court has overlooked or misapprehended the enormity of, and lack of justification for, what it has done. The CTA also seeks rehearing because, to the extent the Court applied only a duty of reasonable care to warn, it has overlooked and misapprehended the actual evidence at trial, which requires affirmance of the appellate court's decision, and the actual instruction given to the jury, which, at a minimum, compels a new trial.

There are fourteen reasons why this Court should grant rehearing and reverse its holding and opinion. If this Court chooses to reaffirm the new duty it has adopted and the extended liability that duty imposes, the CTA respectfully asks this Court to grant rehearing and to modify its opinion to clarify what practically that new duty entails, both for the CTA and for owners and occupiers of land in Illinois generally, and to give its holding prospective application.

In Rejecting Comment *a*'s Requirement of Actual Knowledge or Actual Anticipation, the Court Has Overlooked or Misapprehended the Law, the Evidence, and the Effect and the Scope of Its Imposition of Liability

Comment *a* to section 337 of the Restatement (Second) of Torts provides:

> The rule stated in this Section relates only to the conditions under which a possessor of land is subject to liability to a trespasser whom he knows to be about to come into contact with a highly dangerous artificial condition maintained by him upon the land. . . .

Restatement (Second) of Torts § 337 comment *a* (1965). There are six ways in which the Court's rejection of comment *a* reflect its overlooking or misapprehension of section 337, the evidence, the case on which it relies, or the consequences—legal, judicial, economic, and practical—of its rejection. Those oversights or misapprehensions compel rehearing.

1.

The Court has overlooked or misapprehended the purpose, place, and application of section 337.

Commentators and courts alike agree: section 337 of the Restatement (Second) of Torts restates the "discovered trespasser" exception to the general rule that a possessor of land owes an adult trespasser only the duty not to wilfully or wantonly injure him. *See, e.g.*, Prosser and Keeton on the Law of Torts § 58, at 396-97 (5th ed. 1984), *Cooper v. Unimin Corp.*, 639 F. Supp. 1208, 1213-14 (D. Idaho 1986) ("[section 337] comes into play only where the possessor of land actually knows of the trespasser's presence and that the trespasser is in dangerous prox-

imity to [an undiscoverable or concealed hazard]"); *see also Lee v. CTA*, slip op. at 5 (acknowledging exception). Comment *a* defines the subject of that exception precisely.[1]

The place of the discovered or known trespasser exception found in section 337 of the Restatement is with the other recognized exception—constant or frequent trespass—from the general trespass rule for adult trespassers. RESTATEMENT (SECOND) OF TORTS § 334 (duty owed constant or frequent trespassers for highly dangerous activities); § 335 (duty owed constant or frequent trespassers on limited area for highly dangerous artificial conditions); *see also id.* § 336 (duty owed known or discovered trespassers for dangerous activities). While sections 334 and 335 apply when the possessor of land can from an ***actual*** history of ***constant*** or ***frequent*** trespass reasonably anticipate the presence of a hypothetical trespasser on the land, section 337 (as well as section 336) apply ***only*** when a living, breathing trespasser's "presence in a place of danger has been discovered." *Briney v. Illinois Cent. R.R. Co.*, 401 Ill. 181, 186 (1948).

Ultimately, what this Court has overlooked is that the drafters of the Restatement did not rewrite the common law; they restated it. Section 337 is not "an additional exception to the trespasser rule." *Lee*, slip op. at 6. What-

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[1] By contrast, comment *b* to section 337—a comment this Court did ***not*** reject—provides: "The few cases in which the situation covered by this Section has arisen have involved artificial conditions with a risk of death or serious bodily harm to the trespasser, and such harm has in fact resulted. No reason is apparent, however, for any limitation of the rule to such cases, and it may reasonably be expected to apply to natural conditions on the land, or to the risk of harm less than death or serious bodily harm, including harm to the trespasser's property." RESTATEMENT (SECOND) OF TORTS § 337 comment *b* (1965).

ever this Court has done, it has ***not*** "adopted section 337 of the Restatement (Second) of Torts." *Id.* Sections 336 and 337 restate discovered trespasser exceptions recognized by this Court nearly a century ago in *Peirce v. Walters*, 164 Ill. 560, 563-64 (1897). Those exceptions were never orphaned or in need of being "adopted."

2.

The Court has overlooked or misapprehended the significance of the lack of any evidence of actual prior trespass in this case.

What this Court has done is rewrite what the Restatement drafters restated to create an entirely new rule of law which incorporates the reasonable anticipation of the hypothetical trespasser found in section 335 without adopting section 335's requirement of an actual history of frequent trespass in a limited area. What this Court has overlooked (or perhaps instinctively recognized by ***not*** even attempting to apply section 335) is that the constant trespass required by section 335 demands documentation of real, constant trespass in a limited areas before there can be reasonable anticipation of an otherwise hypothetical trespasser. Three and one-fifth miles is ***not*** by anyone's calculations a "limited area," and ten prior accidents in a twenty-seven year period is not by any stretch of the imagination documentation of frequent trespass. Indeed, as this Court indirectly acknowledges, *Lee*, slip op. at 3, there is ***no*** documented evidence of ***any*** prior trespass from the Kedzie Street crossing onto the CTA right-of-way before October 22, 1977, and the only other accident anywhere near that crossing occurred in 1974 "when a youth [retrieving a ball] fell from the fence he was scaling onto the rail," *id.*

Contrary to this Court's interpretation of section 12 of the Restatement, *see Lee*, slip op. at 6, ***in the context of section 337,*** "reason to know" arises when, for example, a possessor of land hears or sees a would-be (living, breathing) trespasser on neighboring property and knows that he is about to cross the property line and encounter a dangerous artificial condition. How the Court can justify creating a less stringent standard (requiring ***no*** documented prior trespass) for the more stringent exception (requiring actual knowledge or discovery) is impossible to fathom. How, logically, there can be reasonable anticipation of a living, breathing trespasser without a real body, based on no prior history of actual or constant trespass, but no reasonable anticipation of a hypothetical trespasser based on the same history is truly a mystery. Unless the Court grants rehearing, that mystery is now, however, the law in Illinois.

3.

The Court has overlooked or misapprehended the very real distinctions between this facts of this case and those of *Webster v. Culbertson*.

Webster v. Culbertson, 761 P.2d 1063 (Ariz. 1988), this Court's sole authority for the new rule of law that it has created, was a case of constant and frequent trespass in a limited area that should have been decided under section 335 of the Restatement. Section 335 was not, however, discussed or applied because "[the] plaintiff waived the applicability of § 335 by failing to raise the issue in his opening brief in the court of appeals." *Id.* at 1067.

What the Court has misapprehended about *Webster* is, whatever it stands for, it does not stand for the proposition that the presence of a living, breathing trespasser can be reasonably anticipated based on a prior history of

no actual trespass at the site and one prior trespass nearby—***or*** on a twenty-seven year history of ten accidents occurring in a 3.2 mile range around the site. By rejecting comment *a* to section 337, the *Webster* court incorporated section 337 into 335. Regardless of the reasons for, or the soundness of, that decision, the *Webster* court did not—as this Court has—make section 337 a less stringent exception than that restated in section 335. *Webster* is not authority for the rule of law that this Court has created.

4.

By overlooking or misapprehending the purpose of section 337, the actual evidence in this case, and the application of section 337 in *Webster*, the Court has eliminated any need for the long-standing exceptions for constant and discovered trespassers under Illinois law.

The "additional exception to the trespasser rule" that this Court has created, *Lee*, slip op. at 6, has not merged the exceptions found in sections 335 and 337, but has abolished both. There obviously is no need for the constant or frequent trespass exception found in section 335 (or, for that matter, section 334) when reasonable anticipation can be predicated on a prior history of no actual trespass at the site, one prior trespass nearby, and/or a twenty-seven year history of ten accidents occurring in at least a 3.2 mile range around the site. Nor, given those inexact, easily met requirements, is there any need for a discovered trespasser exception per se since actual and known trespass can always be reasonably anticipated. What this Court has overlooked in referring to the exception that it has created as "an additional exception to the trespass rule" is that that "additional exception" is now the ***only*** exception to the trespass rule.

5.

In eliminating the constant and discovered trespasser exceptions to the general trespasser rule, the Court has overlooked or misapprehended the extent of liability imposed not only on the CTA but on all Illinois landowners.

What the Court has also overlooked in creating its all-encompassing new exception to the trespasser rule is the astounding breadth of that exception. Not only has the CTA been held to have reasonably anticipated the presence of a trespasser in a place where a trespasser had never been before, but, because of that holding, all possessors of land in Illinois will now be under an obligation to reasonably anticipate the presence of trespassers in places they may never have been before. ***All*** a trespasser need shown in order for duty to arise is that there has been one incidence of trespass somewhere nearby in the past and ten such trespasses in a wider range around the property. In urban areas—even in ***small*** urban areas—evidence of such trespass will never be lacking.

The Court has also overlooked the effect of comment *b* to section 337, *see supra* note 1—a comment that it did not reject. In comment *b*, the drafters suggest that section 337 encompass cases where there is not death or serious bodily injury, "including [cases involving] harm to the trespasser's property," and that it apply to natural conditions on the land as well. RESTATEMENT (SECOND) OF TORTS § 337 comment *b*. While there is much to commend the suggestion of the drafters in comment *b* ***if*** there is a comment ***a and*** section 337 applies—as it is intended to apply—***only*** to living, breathing discovered or known trespassers, comment *b* creates virtually unlimited liability when section 337 applies—as it now does in Illinois—to any hypothetical trespasser whose presence can be "rea-

sonably anticipated" solely because sometime in the past there was another trespass nearby.

The net effect of this Court's redrafting of section 337 is that every possessor of land in Illinois potentially owes a duty to every trespasser who is injured (or whose property is damaged) by any condition on the land, artificial or natural, dangerous or not-so-dangerous, if the trespasser can establish some evidence of prior trespass nearby. The quantum of proof is small; the cost to the residents of Illinois—public, private, commercial, residential, big and little—will be staggering.

5.

In eliminating the constant and discovered trespasser exceptions to the general trespasser rule, the Court has made the issue of liability for any trespass a question of fact that must be resolved by a jury.

Before the Court's decision in this case, the issue of whether one of the adult exceptions to the general trespasser rule applied could be decided by a court as a matter of law. If, for example, an uninvited, undiscovered adult trespasser was injured by an artificially dangerous condition in a place that no or only few trespassers had been present before and there was no evidence or issue of wilful and wanton conduct, a court could enter summary judgment for the landowner or possessor as a matter of law. *See, e.g., Sumner v. Hebenstreit*, 167 Ill. App. 3d 881, 887 (5th Dist. 1988) (affirming summary judgment); *Votava v. Material Service Corp.*, 74 Ill. App. 3d 208, 213 (2d Dist. 1979) (affirming dismissal).

What the Court has overlooked in establishing a universal "reasonable anticipation" exception to the general trespasser rule is that no case of trespass can ever be decided

as a matter of law for a landowner or possessor of land at the summary judgment stage based on the trespasser's status. Every trespasser can and will be found to have been "reasonably anticipated." Every case will become a jury case. Given the already congested calendars of the state court system, it is difficult to see how such an exception can be justified.

In Sanctioning a Duty of Ordinary Care "To Protect or To Warn the Trespasser," the Court Has Overlooked or Misapprehended the Actual Duty Imposed by Section 337 and the Factual and Legal Consequences of the New Duty it Has Now Established

In its opinion, this Court both holds and suggests that the jury was "properly instructed that the CTA owed a duty of ordinary care to the decedent," *Lee*, slip op. at 1; that "[r]elying on section 337, [the] plaintiff urge[d] [the] court to hold that, if a landowner anticipates the presence of a trespasser in a place of danger, the landowner should be held to a duty of ordinary care to protect and/or to warn the trespasser," *id.* at 6; and "the jury instruction, though premised on the theory that the CTA was engaged in an activity, correctly instructed the jury that the CTA owed the plaintiff's decedent a reasonable duty of care," *id.* at 13. What the Court has overlooked or misapprehended in reaching these holdings or findings are that the actual duty found in section 337 is very different from the duty in the instruction given to the jury and that the Court's equation of the two has effectively abolished trespasser status in Illinois.

6.

By approving both the ordinary care instruction given the jury based on section 336 of the Restatement and the plaintiff's characterization of section 337's duty as one "to protect and/or to warn the trespasser," the Court has overlooked or misapprehended the duty imposed by section 337 which is only a duty to warn of the condition.

Sections 335 and 337 of the Restatement both establish duties to warn of artificial conditions on the land. For known or discovered trespassers, liability arises if the possessor "fail[s] to exercise reasonable care to warn them of the condition." RESTATEMENT (SECOND) OF TORTS § 337. For constant or frequent trespassers, liability will be imposed if "the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved." *Id.* § 335. By contrast, sections 334 and 336—the parallel provisions for dangerous activities on the land—impose liability for physical harm caused "by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety." *Id.* § 336 (known or discovered trespassers[2]); *see id.* § 334 (constant or frequent trespassers).

The "ordinary duty" instruction given the jury in this case was not the duty of reasonable care to warn found in section 337 but, rather, was the ordinary care instruction premised on section 336 and found in Illinois Pattern Jury Instruction 120.03, **"Duty of Owner or Occupant to a Trespasser, Licensee or Social Guest—Injury Caused by Owner's or Occupant's Activities."** ILLINOIS PAT-

[2] Like section 337, section 336 requires the actual knowledge or discovery of a living, breathing trespasser. *See Torres v. S. Pac. Transp. Co.*, 584 F.2d 900, 903-04 (9th Cir. 1979).

TERN JURY INSTRUCTION (CIVIL) No. 120.02 (2d ed. 1971); *see Votava v. Material Service*, 74 Ill. App. 3d at 212-13. Because (and only because) the trial court erroneously concluded that the CTA was conducting a dangerous activity on its land, *see Lee*, slip op. at 13, the jury was instructed that the CTA was "under a duty to use ordinary care ***not to injure Sang Yeul Lee.***" R. C793 (emphasis added) (Appendix B).

Section 337 establishes only a duty to warn of a dangerous artificial condition (but not, as section 335 does, of the risk as well). To the extent this Court is further engrafting a general duty of ordinary care or a duty of ordinary care to protect or not to injure trespassers onto section 337's duty to warn, it has misapprehended section 337. *Johnson v. Rinker Materials, Inc.*, 520 So. 2d 684, 687 (Fla. Dist. Ct. App. 1988) (trespassing cyclist's presence discovered by guard after it was too late to warn him of dangerous quarry; "A landowner only has a duty to exercise reasonable care to warn discovered trespassers of certain known dangerous conditions on the land, and clearly such a duty was not breached in this case") (citing RESTATEMENT (SECOND) OF TORTS § 337 (1965)). There is simply no basis in the language of section 337 or the cases interpreting it for a hybrid duty of ordinary care to warn and to protect.

7.

By approving a duty of ordinary care under section 337 "to protect and/or to warn the trespasser," the Court has overlooked or misapprehended that, in so doing, it has made the duty owed possibly anticipated trespassers greater than that owed constant trespassers or discovered trespassers.

To the extent that there remains any constant or known trespasser exceptions under Illinois Law, *see supra* p. 6

(No. 4), and to the extent this Court is establishing an ordinary duty of care to protect/or to warn trespassers whose presence need only be possibly "reasonably anticipated," *see supra* pp. 4-5 (No. 2), the Court has made section 337's duty to warn known or discovered trespassers of a dangerous artificial condition and section 335's duty to warn frequent trespassers of the danger and risk of an artificial condition *less* than the Court's new duty of ordinary care owed to those possibly anticipated trespassers. Whether or not the Court intended such a result, that result is without rationale legally or logically.

8.

By adopting section 337, eliminating its premise (the discovered trespasser), and expanding its duty (from warning to ordinary care to protect or to warn), the Court has overlooked or misapprehend the fact that it has abolished any distinction in Illinois between trespassers, on the one hand, and licensees and invitees, on the other, and has done indirectly what it acknowledges it could not have done directly.

If in fact this Court intended not only to abolish any need for prior and frequent actual trespass in a limited area or for discovered trespass, but to impose a flexible duty of ordinary care owed to all "reasonably anticipated" trespassers as well, it has succeeded in abolishing any distinction between trespassers and invitees/licensees. In other words, it has succeeded in accomplishing indirectly what it recognized it could not do directly. *See Lee*, slip op. at 5-6.[3]

[3] The Court's expressed (but frustrated) desire to eliminate trespasser status in Illinois altogether, *Lee* slip op. at 5, is both curious and singular in light of the unanimity of state high courts since 1979 in deciding ***not*** to abolish trespasser status. *See* CTA Brief at 59-62.

To paraphrase this Court in the recent case of *Jackson v. Nestle-Beich, Inc.*, 147 Ill. 2d 408, 417 (1992), the Court's new universal exception for all anticipated trespassers has "swallow[ed] the rule [that possessors of land owe only a duty not to wilfully and wantonly injure trespassers]." The inclusive duty of ordinary care imposed on this universally exempt class of trespassers seems remarkably like that established by the General Assembly in the Premises Liability Act as owed to invitees and licensees—i.e., "that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them." ILL. REV. STAT. ch. 80, ¶ 302 (1991). What the Court has overlooked or apparently misapprehended is that, if this Court has not abolished the category of trespasser, it would appear that it has come very close to doing so.

IN PURPORTING TO APPLY SECTION 337'S SPECIFIC DUTY TO WARN AND TO FIND BREACH AND CAUSE IN FACT, THE COURT HAS OVERLOOKED OR MISAPPREHENDED THE ACTUAL INSTRUCTION GIVEN THE JURY AT TRIAL AND THE ACTUAL EVIDENCE PRESENTED

While holding that the CTA owed a duty of ordinary care and "a reasonable duty of care" in this case, *Lee*, slip op. at 1, 13, the Court found and also held that the CTA owed and breached "a duty of ordinary care to properly warn of the third rail," *id.* at 9. While the latter duty is for all practical purposes the duty "to exercise reasonable care to warn [discovered trespassers] of [the dangerous artificial condition]," RESTATEMENT (SECOND) OF TORTS § 337, it was ***not*** the ordinary care instruction given to the jury. By abolishing section 337's requirement of actual discovery or knowledge and by overlooking or misapprehending the actual ordinary care instruction given the jury and the actual evidence at trial, this Court has established

duty that could never arise under section 337 and breach that, as a matter of law and uncontroverted fact, was never found and never occurred.

9.

The Court has overlooked or misapprehended the ordinary care instruction given to the jury and has failed to realize that, at a minimum, a new trial is compelled because the jury in this case was given an affirmative duty of ordinary care not to injure instruction and was never instructed that CTA owed only a specific duty to warn.

Twice in its opinion this Court states that the jury was instructed that the CTA owed the plaintiff's husband a duty of ordinary or reasonable care. *Lee*, slip op. at 1, 13. As the Court's own statement of the facts attests, *id.* at 3, the ordinary care instruction given the jury was based on section 336 of the Restatement, *see supra* pp. 9-10, and was specific.

The jury was specifically instructed that the CTA was "under a duty to use ordinary care ***not to injure Sang Yeul Lee.***" R. C793 (emphasis added) (Appendix B). If the new duty that the Court has created under section 337 had been in effect at the time of trial, the sole duty owed the plaintiff's husband would have been a duty of reasonable care to warn him of the dangerous condition. *See supra* pp. 9-10.[4] However the instruction actually given at trial is characterized, the fact that the jury was not given an instruction stating the specific duty this Court

[4] Unless this Court is engrafting other requirements onto the duty to warn found in section 337. If so, rehearing should be granted to spell out those additional requirements.

has now held that the CTA owed the plaintiff's husband will require—if the Court affirms that new duty—a new trial.

That a new trial would be required was confirmed by the Arkansas Supreme Court in *Axom v. Apartment Builders, Inc.*, 768 S.W.2d 19 (1989), a case in which the trial court had given a general duty of ordinary care instruction even though a more specific duty of care was owed. Vacating the verdict and remanding for a new trial, the court found that it could not say "that prejudice did not result from the failure to give one of [the specific duty] instructions." *Id.* at 22. It was reversible error, the court held, for the trial court not to have given the more specific instructions which "[spoke] directly to the appellee's duties to the appellant." *Id.* at 22.

The jury in this case was not only ***not*** instructed that the only duty owed the plaintiff's husband was to warn him of the third rail,[5] but it was told that the duty owed him was an affirmative duty not to injure him. Since the specific duty of reasonable care to warn was not even a basis of liability (or, for that matter, the law) when this case was tried, it is difficult to imagine how the CTA could be more prejudiced. If this Court decides to retain the new duty that it has created, a new trial where the jury is properly instructed must be granted.

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[5] As the Court must recognize, because the plaintiff did not contend that her husband was a known or discovered trespasser, section 337 was not as a basis of liability, and no instruction was (or could have been) offered stating the specific duty to warn found in section 337.

10.

The Court has overlooked the fact that its finding of a "jury[ ] finding that the CTA breached its duty to adequately warn of the electricity in its third rail" is based on assumptions that the CTA had a duty to warn of risks and that the jury was instructed that the CTA had a specific duty to warn. The CTA did not have such a duty, and the jury was not so instructed and could not have made such a "finding."

In its opinion, this Court finds that because the jury returned a general verdict for the plaintiff and because it was instructed that the CTA "failed to adequately warn of the electricity in its third rail," there was a "jury[ ] finding that the CTA breached its duty to adequately warn of electricity in its third rail." *Lee*, slip op. at 11. What the Court overlooks in reaching this finding is that the duty to warn of electricity is not one that is owed under section 337 of the Restatement, *but see supra* note 4, and that, even though the jury returned a general verdict, it was not given a specific instruction that the CTA owed ***only*** a duty of reasonable care to warn of the condition.

Under section 337, the duty owed to the discovered (now universally reasonably anticipated) trespasser is only a duty of reasonable care to warn of the dangerous artificial condition. The jury was given the instruction because the premise of the plaintiff's case (at least by the end of trial) was that the CTA was engaged in the activity of conducting electricity and owed her husband a duty "to carry on [its] activities upon the land with reasonable care for [his] safety." RESTATEMENT (SECOND) OF TORTS § 336. If the plaintiff's husband had been a discovered trespasser and this case had been tried under section 337, that jury would have been instructed that the CTA owed a duty to warn of the existence of the third rail, not of its risks.

See supra pp. 9-10, *but see supra* note 4. There was no breach of that duty. *See* CTA Brief at 82.

Because the jury was given both duty of care and warning instructions that did not reflect the actual duty owed the plaintiff's husband, the jury could not—and did not—make a finding that the CTA breached the duty that the Court has now recognized in adopting section 337. *But see supra* note 4. If this Court does not reconsider and reject the new duty that it had created, it must allow a jury to properly consider whether the CTA breached that new duty. Failure to spell out that new duty (if it is intended to be more expansive than that found in section 337) and failure to grant a new trial would constitute a grave denial of due process.

11.

The Court has overlooked or misapprehended the uncontroverted affirmative evidence at trial which made any inference or finding of cause in fact factually and legally impossible.

In tandem with its finding that the jury found that the CTA had breached a duty to warn is the Court's holding that this breach was the cause in fact of the plaintiff's husband's death. To reach its cause in fact holding the Court speculates that the jury inferred from the plaintiff's husband's seeking privacy to urinate that he could have read/understood adequate warnings. *Lee*, slip op. at 12. What this Court overlooks in reaching this remarkable holding is that, even if the jury had received a specific or proper instruction relating to the CTA's (new) duty to warn, the jury could not, as a matter of law, have concluded that the lack of any warning was the cause in fact of the plaintiff's husband's death.

Whether seeking privacy to urinate is a matter of higher cognitive function might well be a matter of judicial notice. (Judicial notice would say that it is instinctual/behavioral, not cognitive.) Whether a person with a blood alcohol level of .341 is capable of any cognitive function is not, however, a matter of either judicial notice or common knowledge. It is a matter of expert testimony, and at the trial of this case, each and every expert (including the plaintiff's experts) testified that an individual with a blood alcohol level .341 is grossly intoxicated, beyond the confusion stage, to "stupor." Evans Dep. at 18-19, 23-24, 44, 48-50, 51-53; R. 1277, 1278-79; 999-1000. There was ***no*** evidence—***ZERO, ZIP, NONE***—that the plaintiff's husband could have read or comprehended ***any*** warning, regardless of its form, content, or language.

The jury's verdict in this case was predicated on the instructions—erroneously given—containing the affirmative duty of ordinary care not to injure and allegations of inadequate design and protection. As a matter of fact, that verdict could not have been based on failure to warn. If it had been, the trial court would have been compelled to enter judgment notwithstanding the verdict because where testimony "is neither contradicted, either by positive testimony or by circumstances, nor inherently improbable, and the witness[es have] not been impeached, that testimony cannot be disregarded even by a jury." *Smith v. Pitchford*, 219 Ill. App. 3d 152, 155 (5th Dist.), *appeal denied*, 142 Ill. 2d 665 (1991) (citing *People ex rel. Brown v. Baker*, 88 Ill. 2d 81 (1981)). Even if this Court retains the duty that it has established under section 337 and orders (as it must) a new trial, the plaintiff will never be able to establish cause in fact.

The Court Has Overlooked or Misapprehended not only the Extent to Which It Has Radically Changed (if not Abolished) the Law of Trespass in Illinois but the Reasons Justifying Such an Overruling of Precedent

In its opinion, the Court acknowledges that its decision "represents a slight departure from the traditional rule regarding the duty owed trespassers." *Lee*, slip op. at 9. The Court is far too modest. What its decision represents is a radical revision, if not overruling, of Illinois common law of trespass, one that changes the exceptions to the rule that possessors of land owe trespassers only a duty not to wilfully and wantonly injure them in two, possibly three, ways.

One, the Court's decision changes the trespass exceptions from ones for frequent trespassers in limited areas and actually discovered trespassers to an exception for all trespassers who have the good fortune to trespass in the vicinity of a prior trespass. *See supra* pp. 4-7 (Nos. 2-5). Two, the Court's decision potentially expands liability for death or serious bodily injury from highly dangerous artificial conditions on the land to liability for any injury to person or property caused by any natural or artificial condition on the land, whether dangerous or not. *See supra* note 1, pp. 7-8 (No. 4). Finally, while ostensibly applying only a duty of reasonable care to warn found in section 337, the Court hints that the duty owed is the vastly more expansive duty of ordinary care owed trespassers who are injured by highly dangerous activities on the land. *See supra* pp. 9-12 (Nos. 6-12), note 4.

In describing this radical departure from prior law as "slight," the Court has apparently overlooked or misapprehended the very real and direct consequences that its decision will have for all citizens of Illinois. It has also

overlooked or misapprehended the role *stare decisis* might or should have played in its decision and the inappropriateness of such judicial activism when the legislature has already spoken.

12.

The Court has overlooked or misapprehended the horrific economic consequences that its universal class of anticipated trespasser and expansion of liability will have on all citizens of Illinois.

Since every trespass—no matter how geographically remote or isolated in time—can now be "reasonably anticipated" if there is any history of prior trespass anywhere nearby, the Court's decision in this case has made the CTA an insurer for any injury that occurs on its property if a jury finds that it has not adequately warned the trespasser—no matter how intoxicated or illiterate.[6] Although it may have been the intent of the Court to "send a message" to the CTA, the CTA will not be the only insurer or Illinois citizen to pay for this Court's determination of social policy.

Every governmental and municipal body, every utility, every railroad, every landowner, every lessee, every business, every homeowner, every manufacturer, every construction company, every citizen who occupies or possesses land for any purpose will have to purchase and maintain insurance to cover the new liability created by this Court's decision. But the cost will not be limited to possessors

[6] The CTA is self-insured and under the Regional Transportation Authority Act, ILL. REV. STAT. ch. 111A, ¶¶ 701-705.05 (1991), is required to fund 50% of its operating budget from the fare box. Under the Act, the CTA, METRA, and PACE are required to pay recoveries in cases like this from their operating budgets.

of land. Every citizen will pay for increased governmental/municipal liability through taxes. Users of utilities will pay through higher rates. Users of the CTA and public and private transportation will pay for recoveries like the one in this case either in the form of increased fares or in a loss of service. *See* Gary Washburn, *CTA Hints at Deep Service Cuts in '93*, CHICAGO TRIBUNE, Nov. 6, 1992, § 2, at 1. Consumers will pay in higher prices. Industries will find it cost-effective to leave Illinois. New industries will stay away. Everyone but the newly-defined anticipated trespassers will pay. They alone will benefit.

13.

The Court has overlooked or misapprehended the reasons when and why stare decisis should be ignored and precedent overruled.

In reaching the decision that it did in this case, this Court made a determination that everyone should pay so that trespassers like the plaintiff's husband and their families can benefit. "Our determination of the existence of a duty here, we believe, is properly reflective of the prevailing social policies." *Lee*, slip op. at 10. Quite apart from whether the Court is justified in its belief,[7] application of the doctrine of *stare decisis* would seem to have been more appropriate in this case than the Court's radical reform (if not abolition) of well-developed and functional common law exceptions to the equally well-developed and functional Illinois trespasser rule.

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[7] There are indications that it is not. *See, e.g.*, Mike Royko, *Odd Legal Currents Are at Work Here*, CHICAGO TRIBUNE, Nov. 6, 1992, § 1, at 3.

In the recent Supreme Court decision declining to overrule *Roe v. Wade*, Justice Sandra Day O'Connor, writing for a plurality, articulated four criteria "to test the consistency of overruling a prior decision with the ideal of the rule of law." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808 (1992). "[W]e may ask," she wrote,

> [1] whether the rule has proved to be intolerable simply in defying practical workability . . . ; [2] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . .; [3] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . .; or [4] whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification . . . .

Id. at 2808-09 (citations omitted). Applied to the common law trespasser exceptions in Illinois, those criteria call for a grant of rehearing and a rescinding of the Court's new duty.

That these criteria call for a grant of rehearing and a rescinding of the Court's new duty is readily apparent. Far from proving "intolerable" or "defying practical workability," the common law of trespass that has developed in Illinois over the last 150 years—a common law that includes well-defined exceptions for adults and children from the general rule of liability for only wilful and wanton acts—has proved to be remarkably functional and adaptive. *See* CTA Brief at 65-66. The Court's new duty will impose hardships on every citizen of Illinois who possesses property, pays taxes and utility bills, uses public transportation, and consumes or uses goods and services made or provided in Illinois. *See supra* p. 18. There are no related principles of law that have paralleled or supplanted the

common law of trespass in Illinois—or (successfully) elsewhere. *See* CTA Brief at 52-64. The common law of trespass has not been deprived of either "significant application or justification." *Casey*, 112 S. Ct. at 2809.

For ordinary citizens, trespass law is probably the most understood and accessible of common law doctrines. Because the law of trespass is understood and relied upon, this Court's new duty (which effectively turns the common law on its head, *see supra* p. 5 (No. 2)) could well have unintended consequences. Justice O'Connor voiced concern about such consequences:

> Despite the variety of reasons that may inform and justify a decision to overrule . . . . [t]here is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior ruling would be taken as evidence that justifiable re-examination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

Casey, 112 S. Ct. at 2815. Or, as Justice Davis observed in his eloquent dissent in *Molitor v. Kaneland Community District*, 18 Ill. 2d 11, 37 (1959) (citation omitted): " 'We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations.'" The new duty announced in this case does not satisfy those reasonable expectations.

14.

The Court has overlooked or misapprehended the role of judicial activism when the legislature has already enacted a statute.

The Court's new duty also fails to satisfy principles of jurisprudence that permit the kind of judicial activism that

the Court has undertaken here. Those principles were recently expressed and thoroughly explained by the Fifth District of the Illinois Appellate Court in discussing the doctrine of intrastate *forum non conveniens*:

> There are two sources of law: the law the people make themselves through their representatives in the legislative branch of government, and common law, *i.e.*, the law that is made on an *ad hoc* basis by decisions of the judicial branch which recognize, affirm and enforce usages and customs of immemorial antiquity. . . .
>
> Since the right of the people to make their own law is a primary right in our form of government, the legislature, with the executive branch of government, may codify the common law or, in the absence of common law, may formulate and announce law by drafting and enacting statutes.
>
> Conflicts between the common law, which is broadly and perhaps too expansively expressed herein as judge-made law, and the law made by the people themselves through their legislature and the executive are avoided by two devices: first, the doctrine of separation of powers prevents the legislature and the executive from enacting laws that unduly exercise what are judicial powers . . . ; and second, when the legislature and the executive properly act within the scope of their powers and draft and execute statutes, the judicial branch, irrespective of whether there was any preexisting common law, may only interpret those statutes and may not amend or disregard them. . . .
>
> . . . .
>
> Courts, as a general rule . . . are reluctant . . . to refuse to apply an act of the legislature, and this reluctance . . . is most necessary to avoid both judicial activism and judicial legislation, is most necessary to defer to the right of the people to make law through their legislature, and is most necessary to

> preserve and maintain a proper balance between the three separate branches of government.

Shaffer v. C S X Transp., Inc., 224 Ill. App. 3d 769, 771-72, 773 (5th Dist. 1992) (citations omitted).

As this Court is well-aware, *see Lee*, slip op. at 5, *supra* note 3, in 1984, the Illinois General Assembly and the executive "act[ed] within the scope of their powers and draft[ed] and execute[d] [the Premises Liability Act.]" *Shaffer*, 224 Ill. App. 3d at 772. In enacting section 3 of the Act, the legislature did something more, however, than simply pay lip service to what this Court calls "the trespasser classification," *Lee*, slip op. at 5; *see* CTA Brief at 41-42, and the legislation that it enacted in section 3 was intended to be more than just a social barometer to indicate that "society finds benefit in retaining trespasser status," *id.* Section 3 is nothing more or less than a reaffirmation of the common law of trespass. This Court is not at liberty to amend or disregard that reaffirmation by so eviscerating the common law of trespass that it exists in name only. Yet that is exactly what this Court has done. Despite the fact that the people have exercised their right "to make law through their legislature," this Court has chosen to judicially legislate. Rehearing is requested so that this Court can re-assess the wisdom of that judicial activism in light of section 3 of the Premises Liability Act.

Requests for Clarification, Prospective Application, and Correction

Clarification

If this Court chooses to reaffirm the new duty that it has created in this case, the CTA respectfully asks that the Court clarify the following issues and questions so that

the CTA will know what it should have done and so that it and other possessors of land will have some idea of what they must now do to avoid liability.

What does the duty of reasonable care to warn imposed on the CTA in this case actually mean for the CTA?

- what does "reasonable" mean?
- what more could/should the CTA have done to warn?
- were the signs that the CTA had in place at the Kedzie crossing inadequate because they were not in Korean?
- is it now necessary for signs to be in every known language spoken in Chicago?
- does the duty to warn include a duty to warn of risks as well as a duty to warn of the condition?
- should there be signs with graphics illustrating the third rail alone and the third rail in combination with various means of contact?
- must the CTA post warnings along the length and breadth of the right-of-way fences along side the tracks?[8]
- does the duty extend (as suggested by comment *b* to section 337) to natural, non-dangerous conditions on the land?
- does the Court's "duty of ordinary care" go beyond warnings? if so, does it include a duty to protect and insure the safety of trespassers as well?

[8] The initial cost alone for such signage is estimated to be $3½ million.

What does the duty of reasonable care to warn imposed on the CTA in this case mean for other possessors of land in Illinois?

- are possessors of land (including homeowners) now required to post signs warning intruders of artificial conditions on their property that might be dangerous?
- does the duty extend (as suggested by comment *b* to section 337) to natural, non-dangerous conditions on the land?
- does the Court's "duty of ordinary care" go beyond warnings? if so, does it include a duty to protect as well?

In addition, the Court should clarify whether the trespasser exceptions for constant and discovered trespassers injured by conditions on the land are still extant and, if so, how and why, and whether the duty owed such trespassers has been altered by the Court's "ordinary duty of care to protect and/or to warn" pronouncement. While not discussed in this petition, the scope of child trespassers to whom duty is now owed would have to be expanded to any child who trespasses any place where there has been any prior trespass nearby. Is that the case?

Prospective Application

As the issues and questions reflect (and the list is far from exhaustive), the Court's new duty in this case represents a radical departure from prior law. *See supra* p. 17. Not only must the CTA be offered the opportunity of a new trial if this Court chooses to reaffirm the new duty that it has created in this case, *see supra* pp. 13-15 (Nos. 9, 10), but, because hundreds of thousands of possessors of land in Illinois have operated under the rule

of law that they need warn only constant or discovered trespassers, the Court's new duty must be given prospective application for two reasons.

The first reason why the Court's new duty must be given prospective application is because it is an entirely new exception to the trespasser rule—one that was not foreshadowed by this or any other Illinois court and one that, because it is not based on the common law of Illinois or on the common law restated in the Restatement, could not have been predicted. In *Elg v. Whittington*, 119 Ill. 2d 344, 357 (1987), this Court observed: "Whether the rule will be applied prospectively will depend upon whether: 'the decision to be applied nonretroactively *** establish[es] a new principle of law, either by overruling clear past precedent on which litigants have relied [citation] or by deciding an issue of first impression whose resolution was not clearly foreshadowed.' " The rule established in this case is a new principle of law that, because it overrules prior law and was not foreshadowed, must be given prospective application.

The second reason why the Court's new duty must be given prospective application is because to do otherwise would result in massive injustice and hardship. Such injustice and hardship have been frequently addressed by this Court when a decision of the Court results in a change in the common law. In abolishing the doctrine of sovereign immunity in *Molitor*, for example, this Court was "cognizant of the fact that retrospective application of [its] decision [might] result in great hardship to school districts which [had] relied on prior decisions upholding the doctrine of tort immunity of school districts." 18 Ill. 2d at 26. "For this reason," the Court held,

> we feel justice will be best served by holding that, except as to the plaintiff in the instant case, the rule

> herein established shall apply only to cases arising out of future occurrences. This result is in accord with a substantial line of authority embodying the theory that an overruling decision should be given only prospective operation whenever injustice or hardship due to reliance on the overruled decisions would thereby averted.

Id. at 26-27.

The economic hardship that will result from the prospective application of the Court's new duty in this case is staggering enough. *See supra* p. 18 (No. 12). Like the *Molitor* school districts in 1959, the governments, businesses, utilities, buses and railroads, and everyday citizens of Illinois have relied on well-established common law exceptions—in this case, the well-established common law exceptions to the trespass rule—in preparing their budgets and assessing their liabilities. Their new status as insurers of the public safety must not be retroactively enforced.

Correction

On pages 11 and 12 of the Court's opinion, the majority purports to quote from the CTA's brief. The quotation is inaccurate and ungrammatical. *See* CTA Brief at 82. The CTA respectfully asks that it be corrected and made grammatical.

Because the Court's decision in this case so radically changes the common law of trespass and so vastly expands premises liability in this state, the CTA respectfully asks that this Court allow its petition for rehearing, withdraw or rescind the majority's opinion, and affirm the decision of the Illinois Appellate Court. In the alternative, the CTA asks that rehearing be allowed and its requests

for clarification, prospective application, and correction be granted.

Respectfully submitted,

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No. 71304

In the
Supreme Court of Illinois

JAE BOON LEE, Administratrix of the Estate of SANG YEUL LEE, Deceased, Plaintiff-Appellant, v. CHICAGO TRANSIT AUTHORITY, Defendant-Appellee.	On Petition for Leave To Appeal from the Appellate Court of Illinois, First District No. 88-88 There Heard on Appeal from the Circuit Court of Cook County, County Department, Law Division No. 78 L 6842 The Honorable James E. Sullivan, Judge Presiding.

AMICUS CURIAE BRIEF OF STATE FARM FIRE & CASUALTY COMPANY IN SUPPORT OF THE PETITION FOR REHEARING OF THE CHICAGO TRANSIT AUTHORITY, DEFENDANT-APPELLEE

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STATEMENT OF INTEREST

State Farm Fire & Casualty Company (State Farm), a member of the State Farm Group, is an insurance company, duly licensed in Illinois, with headquarters in Bloomington, Illinois. Nationwide, State Farm wrote millions of premiums in 1991.

In Illinois, State Farm currently has more than 800,000 policies that provide individual homeowners, small ("mom and pop") businesses, and commercial and residential owners or lessors with liability protection and coverage. Hundreds of claims are made each year in Illinois under these policies.

ISSUES PRESENTED FOR REVIEW

The first issue is whether the Court's elimination of frequent trespass or actual discovery as conditions for adult trespassers to be owed more than a duty not to wilfully and wantonly injure them affects Illinois homeowners and small businesses.

The second issue is whether Illinois homeowners and small businesses now owe "reasonably anticipated" trespassers a duty to protect them from injury as well as a new duty to warn of dangerous artificial conditions based on subjective factors.

The third issue is whether the Court's new imposition and expansion of duty are supported by either persuasive or controlling authority.

The fourth issue is whether social policy or societal need supports or justifies the Court's new imposition of duty on owners of rights-of-way in Illinois.

ARGUMENT

Based on failure to adequately warn, the Court has now held the CTA liable for the death of a grossly intoxicated trespasser from a dangerous artificial condition on property where there were five warning signs and at a place where there had been no prior trespass. *Lee v. Chicago Transit Authority*, No. 71304, slip op. at 13 (Ill. Oct. 22, 1992). In so holding, this Court has radically changed the law, not only for the CTA, but for all possessors of real property in Illinois.

As an insurer of over 800,000 homeowners and small businesses in Illinois, State Farm believes that, in reaching its holding, the Court has overlooked or misapprehended the effect of its holding on the homeowners and small businesses in Illinois. The Court has also failed to recognize that neither persuasive nor controlling authority or social policy and societal need support its new duty. Imposition of that new duty and its expansion should be withdrawn.

I. THE COURT'S ELIMINATION OF FREQUENT TRESPASS IN A LIMITED AREA AND ACTUAL DISCOVERY IN A PLACE OF DANGER AS CONDITIONS FOR THE IMPOSITION OF DUTY DETRIMENTALLY AFFECTS ALL HOMEOWNERS AND SMALL BUSINESSES IN ILLINOIS

Prior to the Court's decision in this case, Illinois homeowners and small businesses knew exactly where they stood in relation to adult trespassers as a matter of law. They no longer do.

Prior to the Court's decision in this case homeowners and small businesses, like all other possessors of land in Illinois, owed a duty to adult trespassers not to cause them wilful or wanton injury. Prior to the Court's deci-

sion, there were only three straightforward exceptions to that duty, all of which could be decided by a court as a matter of law.

The first exception was that possessors of land owed a duty to warn adult trespassers they actually discovered near dangerous artificial conditions (like, for example, a fallen live wire) of the danger. *See* Restatement (Second) of Torts § 337 comment a (1965). The second exception arose if they had allowed trespassers to use a limited area of their property so the trespassers by their constant and frequent use of that limited area had created a "beaten path." If they had, they were required to post signs warning the trespassers of dangerous artificial conditions—*e.g.*, hidden culverts or barricades—on which they might injure themselves. *See Miller v. General Motors Corp.*, 207 Ill. App. 3d 148, 155-56 (4th Dist. 1990), *appeal denied*, 139 Ill. 2d 297 (1991); Restatement (Second) of Torts § 335 (1965). Finally, possessors of land involved in dangerous activities like excavating or running trains on their property owed a duty of ordinary care to discovered and frequent trespassers to carry on the dangerous activities in a way not to injure them. *Id.* §§ 334, 336.

The plaintiff's husband in this case was not a discovered trespasser. Nor, as the only documented trespasser ever to have gained entrance to the CTA's right-of-way from Kedzie, was he a frequent trespasser. Although neither a discovered nor frequent trespasser, he was, the Court found, a "reasonably anticipated" trespasser to whom a duty of ordinary care was owed. *Lee*, slip op. at 4. His presence was reasonably anticipated, the Court held, because evidence at trial established that the CTA had knowledge of "10 prior accidents which occurred between 1948 and 1975 on the 3.2 mile segment of track where the CTA's third rail ran at grade level." *Id.*

Virtually all conditions on a homeowner's or business's property are "artificial"—whether the condition is a manicured lawn, a fence, a walkway, a leaf shredder, a patio, or an outdoor gas grill. Under the right circumstances, all of those conditions have the capacity of being dangerous. The Court's adoption of the new category of "reasonably anticipated trespasser" to whom a duty is owed for such conditions will affect all Illinois homeowners and small businesses in three ways.

One, based on the Court's definition of reasonable anticipation in this case, the issue of whether a trespasser is a reasonably anticipated trespasser will always be a factual jury question. This is true because, for any given claim, there must be a factual investigation to establish prior trespass in the last twenty-five years on property similar to and near that of a homeowner or business. Even in cases where claims are ultimately rejected because there was no prior trespass nearby or because of the nature of the condition or injury, the question of status will always be a question of fact to be resolved. Because every claim will be colorable, a reasonably anticipated trespasser will have no difficulty in finding legal assistance to prosecute it.

Two, while most homeowners and businesses will have insurance to cover liability, not all will. Those who have no insurance will, of course, be those least able to afford the new liability imposed by the Court's new universal category of reasonably anticipated trespasser and will be hurt the most. Those with insurance will pay higher rates for their coverage simply because of the volume of claims that now, by definition, present jury questions.

Three, homeowners and small businesses are taxpayers and rate payers as well. Just as the new reasonably an-

ticipated trespassers will be making claims against homeowners and small businesses, they will be making claims against schools, municipalities, governmental bodies, and utilities for injuries sustained on their property. The costs of investigating and defending those factual claims will be reflected in higher taxes and utility rates. Homeowners, particularly the elderly on fixed incomes and those with young families who are struggling to make mortgage payments, and small businesses, especially those that are simply struggling to survive, can ill-afford higher taxes and utility rates. They will, however, be the ones to pay for the new liability and will become the ultimate insurers of the new reasonably anticipated trespassers.

The Court's new all-inclusive, universal category of reasonably anticipated trespasser must not be allowed to become the law.

II. THE COURT'S EXPANSION OF THE DUTY TO WARN FORMERLY OWED FREQUENT AND DISCOVERED ADULT TRESPASSERS DETRIMENTALLY AFFECTS ALL HOMEOWNERS AND SMALL BUSINESSES IN ILLINOIS

The Court has not only created a new all-inclusive, universal category of reasonably anticipated trespasser; it has, in addition, expanded the duty formerly owed frequent and discovered trespassers—a duty *not* breached in this case—in two ways. Both expansions will directly impact homeowners and small businesses.

The duty to warn that was formerly owed frequent and discovered trespassers is found in comments e and f ("*Extent of the duty to warn*") to section 335 of the Restatement (Second) of Torts:

> The duty which the rule stated in this Section imposes upon a possessor of land is not an absolute duty

> to warn the trespasser of even highly dangerous conditions. It is a duty merely to use *reasonable care* to give a reasonably adequate warning. . . .
>
> f. A possessor of land is not subject to liability under the rule stated in this Section unless he has failed to use reasonable care to warn the trespassers of the condition created by him on the land and the risk involved. The possessor is entitled to assume that trespassers will realize that no preparation has been made for their reception and will, therefore, be on the alert to observe the conditions which exist upon the land . . . [and] . . . they will be particularly careful to discover dangerous conditions which are inherent in the use to which the possessor puts the land. . . .

Restatement (Second) of Torts § 335 comments e, f.

The duty to use "reasonable care to give a reasonably adequate warning" found in the Restatement was not breached in this case. *Id.* comment e. The CTA's warnings were more than "adequately reasonable" as a matter of law. The plaintiff's husband in this case passed five signs as he entered the CTA's right-of-way. Those signs said, "DANGER," "KEEP OUT," and "ELECTRIC CURRENT." *Lee*, slip op. at 29 (Heiple, J., dissenting). Had he not been grossly intoxicated, he would have noticed both those signs and the "jaws" and stayed out of the right-of-way. The duty found in the Restatement—the duty not breached—was not, however, the duty applied in this case. Instead an expanded duty was created and applied—a duty that, like a trespasser's status, makes the issue of a warning's adequacy a jury question.

The Court has first expanded the duty found in the Restatement to create a jury question by changing the objective duty to use reasonable care to give a reasonably adequate warning, to a duty to warn based on the sub-

jective capabilities of the trespasser. This shift and expansion of the duty to warn is reflected in the Court's finding that the CTA failed to adequately warn of the presence of third rail. Under prior Illinois law, the inability of the plaintiff's husband to appreciate the significance of the third rail would not have expanded the duty to warn.

That there would have been no greater duty was indirectly confirmed by the appellate court in *Booth v. Goodyear Tire & Rubber Co.*, 224 Ill. App. 3d 720 (3d Dist.), *appeal denied*, 145 Ill. 2d 632 (1992), a case in which a mentally disabled thirteen year old trespasser was injured when he contacted electric power lines. Holding there was no duty owed under section 339 of the Restatement (child trespassers), the court found the plaintiff's

> subjective understanding of the risk of contacting power lines [was] irrelevant. As a matter of *law*, plaintiff is deemed to have appreciated the risk involved with contacting power lines even though subjectively the plaintiff might not actually understand the danger. Defendants are not expected to foresee the unique mental and physical limitations of an individual minor in terms of his particular ability to appreciate the risk of harm.

Id. at 725 (emphasis in original).

Like the minor plaintiff in *Booth*, the plaintiff's husband also had disabilities: (1) he was in a near stupor, and (2) he could not read English. Nonetheless, just as that minor plaintiff was presumed as matter of law "to understand and appreciate the danger associated with power lines," *id.*, a 46-year old man must be presumed to understand and appreciate the danger associated with the third rail *and* understand and appreciate the significance of the words "DANGER," "KEEP OUT," and "ELECTRIC

CURRENT." Under prior law and *as a matter of law*, the CTA was under no duty either to warn of the third rail or to warn of it in a language or mode that this particular grossly intoxicated person could understand.

The Court's holding that the CTA was under such a duty imposes a duty of perplexing proportions for homeowners and small businesses. It is difficult, for example, to imagine how a homeowner or a small business warns undiscovered adult trespassers of dangerous artificial conditions when (1) there is in fact no way to anticipate the presence of such trespassers because there has been no prior trespass and (2) what constitutes a dangerous artificial condition is variable. For example, if a live wire—clearly a dangerous artificial condition—is discovered by a home or business owner down on the property of the home or business, must the owner immediately post signs? If so, must those signs be in various languages depending on the languages spoken within the area? Must they also be graphic?[1]

The second way in which the Court has expanded the Restatement's duty to use reasonable care to give a reasonably adequate warning is by suggesting that Illinois landowners also owe a duty of ordinary care to protect the reasonably anticipated trespassers and keep them from being injured by dangerous conditions. *See Lee*, slip op. at 1, 6, 10, 13. The Court describes, for example, as the duty owed (apparently depending on the danger of the

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[1] In addition, the Court's failure to reject comment b to section 337 of the Restatement (Second) of Torts means that the new duty announced by the Court could result in liability for non-serious injury and damage to a trespasser's property arising from non-dangerous (as well as dangerous) artificial and natural conditions. *See* CTA Petition for Rehearing at 7-8 (No. 5).

artificial condition) as one of installing "more formidable safeguards or, at the least, adequate warning," *Lee*, slip op. at 10.

If the Court is in fact imposing such a duty for dangerous artificial conditions, what can and must the home or small business owner do? Must yards and back lots be inspected for any potentially dangerous materials? Must potentially dangerous machinery (like mulchers for example) be kept under lock and key? What about dumpsters that have heavy lids that could close and injure someone peering in? Must they be kept locked? What about a rake or other gardening equipment left prongs-up in the yard after a busy day? Would a severe injury to a new reasonably anticipated trespasser caused by his stepping on such an implement be a breach of the newly expanded duty announced by the Court?

The Court's expanded duty to warn and its implied duty to insure the safety of trespassers are new law which will have direct and detrimental consequences for all Illinois homeowners and businesses. Reconsideration and rescission are required.

III. THE COURT'S NEW IMPOSITION AND EXPANSION OF DUTY ARE UNSUPPORTED BY EITHER PERSUASIVE OR CONTROLLING AUTHORITY

In its opinion, the Court cites no Illinois law to support or justify the new class of trespassers and the expanded duty that it has created. Instead, the Court cites *Webster v. Culbertson*, 761 P.2d 1063 (Ariz. 1988), in support of the duty and *Imre v. Riegel Paper Corp.*, 133 A.2d 505 (N.J. 1957), to justify its imposition. *Lee*, slip op. at 3-4, 5. An examination of both reveals neither decision supports or justifies the duty or liability.

Both *Webster* and *Imre* were cases of real foreseeability. In *Webster*, evidence indicated that the river wash which the possessor had closed off with a (concealed) barbed wire fence to stop trespassing onto her property, 761 P.2d at 1064, was

> used by pedestrians, children, motorcyclists, four-wheel drive vehicles, dunebuggies, and equestrians, and that tire tracks, footprints and hoofprints were visible in the wash. An equestrian trail crossed the wash less than fourteen yards from the spot where the wash enter[ed] defendants' property.

Id. at 1065. In *Imre*, the plaintiff, an employee of the defendant, was injured when a path that crossed a dump on the defendant's property collapsed onto smoldering coals. The path was used by employees and strangers to reach a river to picnic and fish. "The 'beaten path,' " the court held, "bespeaks constant use, such as implies knowledge and acquiescence by the possessor of land . . . ." 132 A.2d at 510.

Unlike the barbed wire fence in *Webster*, the signs and "jaws" in this case were erected by the CTA to forestall any trespass, not to stop "[the] people who had been using [the wash for recreational purposes from trespassing on] the front portion of the [defendant's] property," *id.* at 1063. Aside from the fact that, unlike the situation in *Webster*, there was no evidence in this case of any prior trespassing onto the CTA's right-of-way from Kedzie, *Webster* does not support the Court's new duty because, among other things, it directly conflicts with this Court's decision in *Hutchings v. Bauer*, 149 Ill. 2d 568 (1992).

The plaintiff in *Webster* was an equestrian who was injured when he attempted to enter the defendant's prop-

erty and ran into the concealed barbed wire fence.[2] Like the defendant in *Webster*, the defendants in *Hutchings* had erected a barrier to keep travelers off their property. The barrier in *Hutchings* was twenty-one feet from where a curve in the road passed a riding track on the perimeter of the defendants' property. Just as the defendant in *Webster* had been aware of trespass before erecting the barbed wire fence, the defendants in *Hutchings* were "aware of the fact that, over the years, numerous vehicles had left the travelled way while riding around the curve . . . and had crashed through their fence [around the property]." 149 Ill. 2d at 569. Like the plaintiff in *Webster*, the motorcyclist/plaintiff in *Hutchings*, once he had left the road, unknowingly headed straight toward the barrier (which he could not see) and was injured.

Even though there was more evidence of prior deviation/would-be trespass from the road in *Hutchings* than in *Webster*, even though the barrier in *Hutchings* was only twenty-one feet rather than fourteen yards from the road, even though the barrier in *Hutchings* was just as hidden and dangerous as the barbed wire in *Webster*, and even though neither plaintiff was a trespasser until he hit the barbed wire/barrier, this Court refused to impose liability on the defendants in *Hutchings*. Instead, it held:

> The defendants were under no duty to dedicate and donate their land to the public without compensation as a travelled way. To hold otherwise would constitute a denial of substantive due process under our Federal and State Constitutions (U.S. Const. amend. V, Ill. Const. 1970, art. I, § 2).

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[2] Presumably, riders on the "equestrian trail" were not trespassers, and the plaintiff in *Webster* became a trespasser only when he attempted to enter the defendant's property.

149 Ill. 2d at 571. How this Court can sanction and adopt the duty and liability found in *Webster* but hold in *Hutchings* that the imposition of such duty and liability would be unconstitutional is difficult to fathom. The two positions cannot be reconciled.[3]

The facts of *Webster* are not only disparate from the underlying facts of this case, but *Webster* itself was wrongly decided.[4] At complete variance with the meaning and intent of section 337 of the Restatement, the "duty" established in *Webster* and adopted by this Court must be rescinded.

Nor does *Imre* provide any justification for the Court's departure from prior law. *Lee*, slip op. at 9. The " 'foreseeable risk of death or severe personal injury' " in *Imre* was the risk of employees/constant trespassers falling through a beaten path into smoldering coals. *Lee*, slip op. at 10-11 (quoting *Imre*, 132 A.2d at 510). The " 'freedom of action that would otherwise characterize the relation of the possessor of land to the trespasser' " decried by the *Imre* court, *id.*, was the employer's/landowner's freedom not to warn the employees/constant trespassers of the hidden

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[3] Not only are *Webster* and *Hutchings* irreconcilable, but so, too, are this case and *Hutchings*. If the plaintiff in *Hutchings* had been deemed a trespasser instead of a traveller, he would have been a reasonably anticipated trespasser. Under the duty imposed in this case, the defendants would have been liable to him for an injury caused by a hidden dangerous artificial condition on their land—because either they did not warn of the hidden barricade or they did not make their property safe for trespassers.

[4] Since the plaintiff in *Webster* was a traveller, not a trespasser, before he hit the barbed wire, *see supra* note 2, section 368 of the Restatement (Second) of Torts (the section applied by this Court in *Hutchings*) would appear to have been the more appropriate section to have applied.

danger—a freedom denied Illinois landowners in the nineteenth century.

The " 'competing considerations of societal policy,' " *id.*, that existed in New Jersey in 1957 are without relevance to this Court's imposition of a duty owed to trespassers whose presence is deemed "reasonably anticipated" based on nothing more than prior trespass somewhere nearby. They are also without relevance to the imposition of a duty to warn based on a trespasser's subjective capabilities, particularly when the possessor of land has provided warnings that are, as a matter of law, reasonably adequate.

No authority, persuasive or controlling, supports or justifies the duty created and imposed by the Court in this case. The duty created cannot be allowed to become law.

IV. NEITHER SOCIAL POLICY NOR SOCIETAL NEED SUPPORTS OR JUSTIFIES THE COURT'S NEW IMPOSITION AND EXPANSION OF DUTY

There is also no social policy or societal need that supports or justifies the duty created in this case. Including the "societal policy" expressed in *Imre* and echoed by the Court, there are four such policies or needs that underlie the Court's decision in this case. Not one withstands scrutiny.

The "societal policy" expressed in *Imre*—i.e., " 'the need for protection against the reasonably foreseeable risk of death or severe personal injury [which] outweighs the freedom of action that would otherwise characterize the relation of the possessor of land to the trespasser,' " *see supra* p. 14—is not a "need" that arises in connection with this case. As a matter of law, reason, and common sense, a trespass and death that have never before occurred in the same place and fashion do not constitute even a re-

motely foreseeable risk. Nor is a trespasser who has a blood alcohol level of .341, purportedly knows nothing of third rails, and manages to transverse trespass barriers that no one before has ever negotiated remotely foreseeable. The "societal policy" underlying the Court's decision is *not* " 'protection against [a] reasonably foreseeable risk of death or severe personal injury.' " *Lee*, slip op. at 10.

Never articulated, the real social policies and societal needs that Court assumes must be addressed and remedied are beliefs that (1) the CTA should pay for all injuries and death on its grade level rights-of-way; (2) unanticipated and undiscovered trespassers like the plaintiff's husband and their families should, as a matter of policy, be entitled to recover; and (3) the common law classification of trespasser serves no function and must be abolished in fact if not in name.

The Court's obvious belief that the CTA should pay for injuries on grade level rights-of-way is found in its statement that "the risk of serious death or injury to a pedestrian [sic] as a result of contact with a third rail located at grade level, in close proximity to a sidewalk, outweighs any burdens associated with more formidable safeguards or, at the least, adequate warning." *Lee*, slip op. at 10.

Assuming a risk that simply does not exist, the Court's statement and the belief on which it rests erroneously assume that the CTA can physically and financially renovate its grade level crossings with "more formidable safeguards." Contrary to the Court's assumption, the burden would be great. And that burden would be shouldered by those who use mass transit—i.e., workers, students, the elderly—in forms of increased fares, curtailed service, and/or a bankrupt system. *See* Gary Washburn, *CTA's Fare*

Boosts Not Enough: More Cuts in Service on the Way, Chicago Tribune, Nov. 24, 1992, § 1, at 1. As summarized by Jennifer Neary, executive director of Metro Seniors in Action, a senior citizens group: " 'For a lot of folks, it just becomes a choice of whether or not they travel.' " *Id.* at 12.

The Court's belief that trespassers like the plaintiff's husband and their families should recover is reflected in the Court's statement that its "determination of the existence of a duty here . . . is properly reflective of the prevailing social policies." *Lee*, slip op, at 10. With all due respect, the Court misjudges the social reality.

Reflected in Mike Royko's November 6, 1992 *Chicago Tribune* column,[5] the notion that a person incapable of reading the perfectly plain and illuminated warnings at the CTA crossing because of a blood alcohol level of .341 should recover nearly $2 million (the judgment with interest) for doing what no one before was ever imprudent enough to do is not one that the person on the street thinks is right or just. This is especially true because that person on the street is more likely than not a user of mass transit and, as a user of mass transit, will pay (and pay dearly) for the duty recognized and imposed in this case.

The Court's belief that the common law classification of trespasser has outlived its usefulness is revealed in its statement that it found the plaintiff's arguments in support of abolition of trespasser status "extensive and compelling." *Lee*, slip op. at 5. Despite acknowledging that, because of the Premises Liability Act, "society yet finds

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[5] Mike Royko, *Odd Legal Currents Are at Work Here*, Chicago Tribune, Nov. 6, 1992, § 1, at 3.

some benefit in retaining the trespasser classification," *Lee*, slip op. at 5, this Court has in fact abolished trespasser status by making the presence of any trespasser in a place of danger "reasonably anticipated." Virtually every trespasser is now "reasonably anticipated" and owed at least a duty to warn based on his or her subjective abilities and limitations.

The Court's belief that trespasser status has outlived its usefulness and should be abolished is one that was touted in the mid-1970s and abandoned over a decade ago. In 1988, the Arizona Appellate Court refused a request to abolish trespasser status and held that a minor plaintiff's presence on a utility pole was not reasonably anticipated. *Moore v. Tucson Elec. Power Co.*, 761 P.2d 1091, 1092 (Ariz. Ct. App. 1988). Noting that Prosser and Keeton "advocate the retention of the categories," the court quoted them:

> "Although the abolition movement gathered impressive momentum through the mid-1970s, it thereafter quite abruptly lost its steam, and in 1979 came to a screeching halt. . . . [This] may reflect a more fundamental dissatisfaction with certain developments in accident law that accelerated during the 1960s—the reduction of whole systems of legal principles to a single, perhaps simplistic standard of reasonable care, the sometimes blind subordination of other legitimate social objectives to the goals of accident prevention and compensation, and the commensurate shifting of the decisional balance of power to the jury from the judge. . . . [T]he courts are gaining a renewed appreciation for the considerations behind traditional duty limitations toward trespassing adults, and . . . they are acquiring more generally a healthy skepticism toward invitations to jettison years of developed jurisprudence in favor of beguiling legal panacea."

761 P.2d at 1093 (quoting Prosser and Keeton on the Law of Torts § 62, at 433-34 (5th ed. 1984)). Under the guise

of retaining trespasser status in this case, the Court has "jettison[ed] years of developed jurisprudence in favor of [the] beguiling legal panacea [of making all trespassers 'reasonably anticipated']." *Id.* It should reconsider that decision.

The Court should also reconsider its decision because, even though it may believe that there is a societal need for the CTA to pay for all grade level injuries to trespassers, the ones who will really be paying are Illinois homeowners and small businesses. In the end, they will be the absolute insurers of the public safety.

CONCLUSION

As the insurer of over 800,000 homeowners and small businesses in Illinois, State Farm believes that the Court's decision will have a direct and detrimental effect on State Farm's insureds. As *amicus curiae*, State Farm urges this Court allow the CTA's petition for rehearing, withdraw the opinion filed on October 22, 1992, and affirm the decision of the appellate court.

Respectfully submitted,

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